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IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF NEW MEXICO  
UNITED STATES OF AMERICA,  
Plaintiff,  
vs. NO: CR-15-4268 JB  
ANGEL DELEON, et al.,  
Defendants.  
VOLUME 1  
Transcript of Motion Proceeding before The  
Honorable James O. Browning, United States District  
Judge, Las Cruces, Dona Ana County, New Mexico,  
commencing on December 17, 2018.  
For the Plaintiff: Ms. Maria Armijo, Mr. Randy  
Castellano  
For the Defendants: Mr. Brock Benjamin; Ms. Cori  
Harbour-Valdez; Mr. Pat Burke; Mr. Robert Cooper; Mr.  
Scott Davidson; Ms. Amy Jacks; Ms. Lauren Noriega;  
Mr. Marc Lowry; Ms. Carey Bhalla, Mr. Bill Maynard;  
Mr. Donovan Roberts; Ms. Lisa Torraco; Mr. James  
Castle

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1 THE COURT: All right. Let's get started  
2 here. Good morning, everyone. Do I get to say I  
3 missed you?

4 SEVERAL VOICES: Yes.

5 THE COURT: All right. Okay. All right.  
6 The Court will call United States of America versus  
7 Angel DeLeon, criminal number 15-4268-JB. If  
8 counsel will enter their appearances for the  
9 Government.

10 MS. ARMIJO: Maria Armijo on behalf of the  
11 United States and Randy Castellano. Good morning,  
12 Your Honor.

13 THE COURT: Ms. Armijo and Mr. Castellano,  
14 good morning to you. And for defendant --

15 (Off-the-record discussion.)

16 THE COURT: All right. Speak, and we'll  
17 get some microphones working here.

18 MR. BENJAMIN: Good morning, Your Honor.  
19 Brock Benjamin on behalf of Mr. Gallegos.

20 THE COURT: Mr. Benjamin, good morning to  
21 you. Mr. Gallegos, good morning to you.

22 THE DEFENDANT: Good morning.

23 THE COURT: And for defendant Edward  
24 Troup.

25 MS. HARBOUR-VALDEZ: Good morning, Your

1 Honor, Cori Harbour-Valdez and Pat Burke on behalf  
2 of Edward Troup.

3 THE COURT: Good morning to you.

4 THE DEFENDANT: Good morning.

5 THE COURT: And for defendant Billy  
6 Garcia.

7 MR. COOPER: Good morning, Your Honor.  
8 Bob Cooper and Jim Castle on behalf of Billy Garcia,  
9 and he's present.

10 THE COURT: Mr. Cooper, Mr. Castle, and  
11 Mr. Garcia, good morning to you.

12 And for defendant Arturo Arnulfo Garcia.

13 MR. DAVIDSON: Good morning, Your Honor.  
14 Scott Davidson here on behalf of Mr. Arturo Garcia.  
15 Mr. Blackburn will join us later.

16 THE COURT: Mr. Davidson, good morning to  
17 you. Mr. Garcia, good morning to you.

18 And for defendant Daniel Sanchez.

19 MS. JACKS: Good morning, Your Honor. Amy  
20 Jacks and Lauren Noriega on behalf of Mr. Sanchez.

21 THE COURT: All right. Ms. Jacks, Ms.  
22 Noriega, and Mr. Sanchez, good morning to you.

23 THE DEFENDANT: Good morning.

24 THE COURT: For defendant Anthony Ray  
25 Baca.

1 MR. LOWRY: Marc Lowery on behalf of  
2 Anthony Ray Baca, who is present in court today at  
3 my right.

4 THE COURT: All right, Mr. Lowry. Is Ms.  
5 Duncan back there?

6 MR. LOWRY: No, Your Honor. She's going  
7 to be absent.

8 THE COURT: All right. Mr. Lowry, Mr.  
9 Baca, good morning to you.

10 And for defendant Carlos Herrera.

11 MS. BHALLA: Good morning, Your Honor.  
12 Carey Bhalla for Mr. Herrera.

13 MR. MAYNARD: Bill Maynard for Mr.  
14 Herrera.

15 THE COURT: All right, Ms. Bhalla, Mr.  
16 Maynard, and Mr. Herrera, good morning to you.

17 And for defendant Andrew Gallegos.

18 MR. ROBERTS: Good morning, Your Honor.  
19 Donovan Roberts and Lisa Torracco for Mr. Gallegos.

20 THE COURT: All right. Mr. Roberts, Ms.  
21 Torracco, and Mr. Gallegos, good morning to you.

22 All right. We're here on a number of  
23 motions. I understand that y'all have agreed or at  
24 least submitted a batting order, and I think the  
25 first one is document 2416. This is Mr. Billy

1 Garcia's motion to produce post-conviction  
2 discovery, and for in camera review. I understand  
3 that everyone else has also joined this motion.

4 Let's see. Seven. Yes.

5 So Mr. Castle, are you going to take the  
6 lead on this motion?

7 MR. CASTLE: Yes, Your Honor.

8 MR. CASTELLANO: Your Honor, how does the  
9 Court want us to mark exhibits for this?

10 THE COURT: I think probably since it's a  
11 discrete hearing, why don't -- I'm going to go back.  
12 I guess having gotten into this, I'll tell you where  
13 I'm going with drafting an opinion. It seems to me  
14 that because of the evidence issues, I am probably  
15 going to draft -- this is what I'm thinking at the  
16 present time -- draft an opinion on the first trial  
17 and then draft an opinion on the second trial.

18 And it seemed to me that this motion,  
19 while y'all put it at the beginning, is probably  
20 going to go at the bottom of the second motion. So  
21 that's my sort of thoughts at the present time. So  
22 with that, it seems to me that we ought to do what  
23 we did in the pretrial: This ought to be  
24 Defendant's Exhibit 1 for -- we can call it Motion  
25 1, we can talk about Document 2416. Excuse me. It

1 should be Document A, not 1, the Government for any  
2 exhibits. But Document A. If you want to do it by  
3 Motion 1 or if you want to do it by Document Number  
4 2416, that way I'll keep everything straight when I  
5 go back to Albuquerque and work on these opinions.  
6 How does that work for you?

7 MR. CASTLE: That sounds good. I think I  
8 prefer to do it by Exhibit A, Document 2416.

9 THE COURT: That will be very clean. So I  
10 don't dispute that at all.

11 MR. CASTLE: Your Honor, I'm offering  
12 Defendant's Exhibits A and B by stipulation with the  
13 Government. We are requesting it be under seal  
14 because some of the documents include phone records  
15 by Agent Acee.

16 THE COURT: All right. Any objection from  
17 any of the other defendants? Not hearing any.  
18 Ms. Armijo?

19 MS. ARMIJO: No objection, Your Honor.

20 THE COURT: All right. So Defendant's  
21 Exhibits A and B for Document 2416 will be admitted  
22 into evidence.

23 (Defendant Garcia Exhibits A and B  
24 admitted.)

25 MR. CASTLE: Your Honor, at this time I'd

1 like to call Agent Bryan Acee to the stand.

2 THE COURT: All right. Mr. Acee, if  
3 you'll return to the witness box up here, and I'll  
4 remind you that you're still under oath. I guess  
5 since we're starting a new hearing, let me have  
6 Ms. Bevel swear you in, if you'll raise your right  
7 hand.

8 BRYAN ACEE,  
9 after having been first duly sworn under oath,  
10 was questioned, and testified as follows:

11 THE COURT: Mr. Acee, Mr. Castle.

12 DIRECT EXAMINATION

13 BY MR. CASTLE:

14 Q. Good morning, Agent.

15 A. Good morning.

16 Q. We meet again.

17 Agent Acee, I'm going to ask you some  
18 questions regarding some text messages and phone  
19 calls you had with an individual by the name of  
20 Leroy Lucero. Is that a person you're familiar  
21 with?

22 A. Yes, sir.

23 Q. When did you first have a conversation  
24 with Mr. Lucero? If you could give us a year,  
25 perhaps, to start with.



1 A. I think it was in 2016.

2 Q. And do you know, can you try to give us a  
3 month?

4 A. Not without looking at 302s, no.

5 Q. Would that have been in the formal  
6 interview that was reduced to a 302?

7 A. Yes, sir.

8 Q. In 2018 -- I'll get directly to the  
9 issue -- did you begin to have further contact with  
10 Mr. Lucero either by text message or by phone call?

11 A. Yes.

12 Q. How many times approximately did you have  
13 phone calls with him?

14 A. I'd defer to the phone records. I'm not  
15 sure.

16 Q. Would all of the phone calls that you made  
17 with him be reflected in the phone records that were  
18 produced in discovery?

19 A. Yes.

20 Q. So you didn't use any other cellphone or  
21 land line to have phone call discussions with Mr.  
22 Lucero?

23 A. Not that I recall. I mean, it's always  
24 possible a person could call the office and be  
25 transferred to my desk, but I don't believe so. I

1 think it was all over cellphone.

2 Q. Did you have an opportunity to look at  
3 Motion Number or Document Number 2416?

4 A. I have 2438, and I may not have 2416, sir.

5 MR. CASTLE: May I approach the witness,  
6 Your Honor?

7 THE COURT: You may.

8 BY MR. CASTLE:

9 Q. I show you what is labeled Document 2416.  
10 Does that look familiar?

11 A. Yes, sir.

12 Q. And you were provided with what's known as  
13 a Touhy letter in this case; is that right?

14 A. Yes, sir.

15 Q. And it was indicated that these two  
16 motions or these two, at least, documents were going  
17 to be discussed during this hearing?

18 A. Yes.

19 Q. Okay. If you could turn to page 3, there  
20 is a letter C here. It indicates there were 92 text  
21 messages and 41 phone calls that you had with Mr.  
22 Lucero. Is that an accurate calculation of the  
23 number of calls and text messages, or did you  
24 ever --

25 A. I presume.

1 Q. Okay. You didn't go back and count;  
2 right?

3 A. No, sir.

4 Q. Agent Acee, I'm going to show you what's  
5 been admitted as Exhibit B. If you could take this  
6 yellow highlighter and highlight your phone number,  
7 if it's reflected in those records. Just the first  
8 time. You don't need to each time.

9 Looks like you've gone through at least  
10 five pages. Your phone number is not reflected on  
11 the first five pages?

12 A. I don't believe so.

13 Q. Whose records are these? Can you tell us  
14 whose records they are?

15 A. I presume they're Leroy Lucero's. I can  
16 give you the phone number that they pertain to.

17 Q. Why don't you go to the day of February 15  
18 and see if you can find a phone call that Mr. Lucero  
19 had with you.

20 MS. BHALLA: Your Honor, sorry.

21 Mr. Acee, do you mind speaking into the --  
22 I'm having a hard time hearing you. I'm sorry.

23 A. So this one I've highlighted I believe is  
24 the first.

25 Q. And that's at page 10 of Exhibit B; is

1 that right?

2 A. Yes, sir.

3 Q. Now, that number is no longer operational;  
4 is that my understanding?

5 A. Correct.

6 Q. So disclosing that number on the record  
7 wouldn't endanger anyone?

8 A. No, sir.

9 Q. Okay. What number is that?

10 A. (505) 231-2844.

11 Q. Was this a personal cellphone, or was this  
12 a cellphone that was issued by the FBI?

13 A. It's an FBI cellphone.

14 Q. Are there policies concerning the  
15 retention of such phones or destruction of such  
16 phones?

17 A. Yes.

18 Q. What does the policy say?

19 A. With the phone itself, I'm not sure. But  
20 we have policies regarding records retention.

21 Q. I show you what's been admitted as Exhibit

22 A. Are you able to tell us if it's the actual  
23 policy, or if this is a different policy?

24 A. This is the policy.

25 Q. And can you paraphrase what the policy

1 requires with regard to the retention of FBI  
2 cellphones and/or data contained thereon?

3 A. The policy doesn't address the cellphone  
4 itself. It address records.

5 Q. Okay.

6 A. And the Bureau categorizes records into  
7 different categories. And depending on what  
8 category there is, there are retention policies and  
9 terms or term limits in terms of how long the record  
10 needs to be retained.

11 Q. And can you tell us what the categories  
12 are?

13 A. Do you mind if I --

14 Q. Absolutely. Refer to Exhibit A if you  
15 need to.

16 A. I know that off the top of my head,  
17 there's transitory, nontransitory, and nonrecord.  
18 But I would want to review the policy a little  
19 closer if we're going to get into details on it.

20 Q. That's fine.

21 A. Okay. As I mentioned, there are three  
22 types of records that the policy recognizes:  
23 Nontransitory, transitory, and nonrecord.

24 Q. What is your understanding of the  
25 difference between transitory and nontransitory?

1           A.     The first thing that jumps out is the  
2     significance of it. So a nontransitory record would  
3     be something that would maybe be the highest level,  
4     I'll say, in terms of retention. Nontransitory  
5     records are typically something that we would upload  
6     into Sentinel, which is our report database. We put  
7     a case number on it and we keep it.

8           Q.     Let me ask you a couple follow-up  
9     questions. So would that be, for example, if a  
10    recording on a phone or a text message on a phone  
11    contains something that is relevant to an  
12    investigation?

13          A.     Yes.

14          Q.     Did you have more than one cellphone that  
15    you used at this time?

16          A.     At times. I mean, at times I'll have as  
17    many as -- I think I've had as many as six. It just  
18    depends how many undercover operations we have  
19    going.

20          Q.     Why did you use this particular phone to  
21    make all your phone calls with Mr. Lucero?

22          A.     Because it was my Bureau-issued phone. So  
23    for people to contact me in a work context, other  
24    than family, that's the phone number they had for  
25    me. Mr. Lucero wouldn't have had any other phone

1 numbers.

2 Q. Now, would there be times during this  
3 investigation in particular where you would get a  
4 phone call or place a phone call where the content  
5 of the phone call was investigatory in nature?

6 A. Yes.

7 Q. The same with text messages. Did you  
8 receive or place text messages on that phone that at  
9 times were investigatory in nature?

10 A. If I had control over it, I usually tried  
11 to do it with a phone call and a recording. There  
12 may have been some text or email. None are jumping  
13 out at me off the top of my head.

14 Q. When you retired this phone, I guess is,  
15 how did you end up terminating the use of the phone?  
16 What would you call it?

17 A. Well, the Bureau updates our phones every  
18 so often. We have no control over that. We're  
19 given a date and a time. We show up with our phone  
20 and we're issued a new phone.

21 Q. And do you at that time -- well, is it a  
22 person who does this, that gives you the phone?

23 A. It is, yes.

24 Q. And do you go through with them and say,  
25 "Now, this particular text message is nontransitory,

1 investigative record, and this one is not?"

2 Do you go through those things and kind of  
3 delineate which needs to be retained and which do  
4 not?

5 A. That responsibility falls on me. The  
6 person that I'm meeting with to obtain the new phone  
7 is just an enterprise security operations group that  
8 just says, "Here is your new phone and here are the  
9 security features," and they'll brief us on whatever  
10 updates might be in there.

11 Q. Did you in your -- after this motion was  
12 filed, did you follow up and determine what happened  
13 to the phone?

14 A. I did, sir.

15 Q. And what happened to the phone, to your  
16 knowledge?

17 A. So I believe the phone that you're  
18 interested in was two phones ago. So if I  
19 understand the timeframe you're looking for, that  
20 was when I had the Galaxy S5, and that phone has  
21 been destroyed.

22 Q. In what way?

23 A. I don't know. The Bureau -- I asked the  
24 same question. I spoke with our enterprise IT point  
25 of contact for my squad, and I also talked to his



1 supervisor. What I was told is: When the Bureau  
2 collect our phones, because of the security  
3 features, they're not wiped clean and sold at a used  
4 cellphone store. They're destroyed, because of the  
5 security features that are on them.

6 Q. Is the data on them downloaded and  
7 retained, at least on that phone that we're talking  
8 about?

9 A. Not that I'm aware of, no.

10 Q. What did you do to determine whether it  
11 was downloaded and retained?

12 A. I asked.

13 Q. And who did you ask?

14 A. The first time I asked, I asked Mr. Ortiz.  
15 I'm not sure his first name, but he's one of our IT  
16 folks. And the second time, I asked -- because I  
17 think I asked in response to an email I got, and  
18 then I subsequently received your subpoena and asked  
19 again. And that time I talked to a supervisor by  
20 the name of Oray (phonetic) Alverson (phonetic), in  
21 the Enterprise IT Protocol Unit. And she told me  
22 that unless there had been a preservation letter  
23 sent to Verizon or a litigation hold placed on my  
24 communications, that they wouldn't be retained.

25 Q. Did they indicate how long such a hold --

1 you know, how soon you'd have to put a hold on that  
2 in order to retain those -- that data?

3 A. No, sir. I have some experience having  
4 litigation holds placed on communications before,  
5 and I know that a reminder comes out every few  
6 months, but...

7 Q. At Verizon, is it two years that Verizon  
8 will retain data for a particular phone number, or  
9 is it six months, or do you know?

10 A. It's three to seven days for text  
11 messages.

12 Q. Well, in this case, okay, let's back up on  
13 that. What kind of data is retained for only three  
14 to seven days?

15 A. Text messages.

16 Q. The actual content of text messages?

17 A. Correct, sir.

18 Q. How about the number that was texted?

19 A. Oh, the call detail records. Off the top  
20 of my head, I've had luck getting those  
21 substantially later, months later, perhaps, maybe a  
22 year later I've been able to go back.

23 Q. Exhibit B before you -- when were those  
24 call detail records obtained? Well, let me ask you  
25 in a leading fashion. Were those records obtained

1 pursuant to a grand jury subpoena that was issued?

2 A. I believe so.

3 Q. And would that have been issued on May 3  
4 of 2018?

5 A. That's possible.

6 Q. How far back do those records go?

7 A. It looks like they start on February 3,  
8 2018.

9 Q. So just in reviewing that particular  
10 exhibit, would it be fair to say that three months  
11 of toll records are retained by Verizon?

12 A. Yes.

13 Q. The phone that you were talking about --  
14 did you have the ability to record a call if  
15 something important was being stated on that phone?

16 A. I carry a couple of recorders, so I can  
17 record at almost anytime.

18 Q. So those are recorders that attach to the  
19 phone in some fashion?

20 A. Yes, sir. They attach to an ear piece and  
21 to the phone itself, and they'll record.

22 Q. So for example, during trial we would  
23 sometimes see you with the ear piece and with your  
24 phone. Would that have been the device we're  
25 talking about from, or some other device?

1 A. No, I didn't make any recordings in the  
2 courtroom.

3 Q. Okay. I wasn't -- I'm not talking about  
4 whether you made recordings, but is it that similar  
5 kind of head piece?

6 A. No.

7 Q. Okay. During any of the times that you  
8 were talking to Mr. Lucero, did you record your  
9 phone calls with him?

10 A. No. I recorded an interview with him, but  
11 no phone calls.

12 Q. And with respect to the text messages that  
13 you had with him, were they just from him to you, or  
14 you to him, or both?

15 A. They'd be both. I would generally respond  
16 if someone texted me.

17 Q. So is it your memory that the text  
18 messages that you had with Mr. Lucero were prompted  
19 by him messaging you first and then you responding  
20 to that text message?

21 A. No. Sometimes I might. I remember after  
22 we interviewed him, I left my sunglasses at his  
23 house, so I texted him to say I was coming back to  
24 get those. So there may have been times that I  
25 started the text.

1 Q. And the records would reflect kind of the  
2 order in which those texts were done; is that  
3 correct?

4 A. That's correct.

5 Q. During the time that -- and I want to kind  
6 of talk about the time period in which you're having  
7 these text messages and phone calls. Am I accurate  
8 that they would have been between the dates of  
9 February 15, which is the first record that you show  
10 there, and then May 3 of 2018?

11 A. The records for May 3? I think that's  
12 fair.

13 Q. Would you have perhaps had phone contact  
14 with Mr. Lucero prior to February 15, as well,  
15 either by text or by voice calls?

16 A. Yes.

17 Q. And would you have had contact with Mr.  
18 Lucero after February 3, 2018, by either text or  
19 voice calls?

20 A. Perhaps, but not for very much longer.

21 Q. Now, during that time period was -- had  
22 Mr. Lucero either requested an attorney or had one  
23 appointed to him?

24 A. He did have an attorney appointed to him.  
25 I just don't recall the timeline there.

1 Q. During the time period that he had a  
2 lawyer, would it be fair to say that you had phone  
3 contact with him and text message contact with him?

4 A. Yes, sir.

5 Q. Now, was that with the permission of the  
6 lawyer?

7 A. Yes, sir.

8 Q. And that was with the knowing -- with the  
9 knowledge of the prosecutors?

10 A. Yes, sir.

11 Q. Given that you were having, I guess, some  
12 kinds of conversations, either through text message  
13 or phone call, with a witness, what parameters were  
14 put on you to retain or to take notes or somehow  
15 record in some fashion the content of those  
16 conversations?

17 A. If any witness were to give me substantive  
18 information or pertinent information, I need to and  
19 I must record that.

20 Q. So that was what you were told, to record  
21 anything that was substantive or pertinent?

22 A. I mean, I guess I was told that at some  
23 point in my career, but I know that's a  
24 responsibility that I have.

25 Q. Right, but I mean, this is an unusual

1 situation to some extent when you're contacting  
2 someone represented by counsel; right?

3 A. That's not unusual.

4 Q. That's not unusual? Well, for part of  
5 this period, the attorney and Mr. Lucero had  
6 indicated that he wasn't going to make any  
7 statements regarding this case because he was  
8 relying upon his Fifth Amendment right to remain  
9 silent; is that right?

10 A. Yes.

11 Q. Okay. And during that time period that he  
12 was still maintaining that right to remain silent,  
13 you had communication with him; is that right?

14 A. I'm not sure I did.

15 Q. Well, that is the subject of this motion  
16 to some extent; is that right?

17 A. Yes, sir.

18 Q. And after you had that motion and were  
19 told that you were going to be testifying about the  
20 content of those motions, did you go back to check  
21 to see if any of your communication with Mr. Lucero  
22 took place during the time that he had asserted his  
23 rights to remain silent under the Fifth Amendment?

24 A. No, sir.

25 Q. Specifically at paragraph 9 of Document

1 Number 2416, which is the motion I showed you --

2 MR. CASTLE: May I approach the witness  
3 again, Your Honor?

4 THE COURT: You may.

5 BY MR. CASTLE:

6 Q. It indicates here that Mr. Lucero asserted  
7 his rights in court on March 13, 2018, and  
8 reasserted that right during a March 16, 2018, court  
9 appearance. One phone call between Mr. Lucero and  
10 Agent Acee occurred after court recessed on March  
11 13, 2018, and lasted for nearly 15 minutes, followed  
12 by 11 text messages and another phone call before  
13 Mr. Lucero asserted his Fifth Amendment rights on  
14 March 16.

15 Did you ever look to see if that was an  
16 accurate statement?

17 A. I believe you. I did not look at it,  
18 though.

19 Q. Okay. So during that time period when he  
20 asserted his Fifth Amendment rights and you were  
21 having communications with him, at least that part  
22 is unusual; it's not normal course of things; right?  
23 You don't contact witnesses when they've asserted  
24 their Fifth Amendment rights normally, under normal  
25 circumstances?



1 A. I don't know that I've been faced with  
2 that exact predicament before.

3 Q. Like, for example, Mr. Garcia, after he  
4 was represented by counsel, you would never go and  
5 contact him personally without the consent of  
6 counsel or the permission of the Court or --  
7 generally speaking; right?

8 A. That's correct.

9 Q. I mean, you might if it's a completely  
10 different offense. That might be an exception?

11 A. Correct.

12 Q. One that many people in this courtroom  
13 would disagree with, but...

14 So during that particular time period when  
15 he's represented by counsel, Mr. Lucero, and where  
16 he had asserted his Fifth Amendment rights, were  
17 there particular precautions that you were told to  
18 take to make sure that your conversations did not, I  
19 guess, morph or change into areas that would be  
20 protected under that Fifth Amendment right?

21 A. Yes.

22 Q. What precautions were you instructed to  
23 take?

24 A. I only talked to him about his travel,  
25 safety issues, and then he was still helping us on

1 two other matters unrelated to -- I won't say  
2 unrelated to the SNM, but unrelated to the charged  
3 offenses.

4 Q. Are these matters that are reflected in  
5 the discovery documents that have been produced to  
6 the defense?

7 A. We turn over everything in the SNM file  
8 under that 245-U. So if they pertained to the  
9 charges in this case, they would have been turned  
10 over. If they pertained to other matters, I'm not  
11 sure.

12 Q. Well, what were the two matters he was  
13 assisting you in?

14 A. There was an SNM member killed in Las  
15 Vegas. It turned out to be a domestic issue over a  
16 female, so he was helping us with that. And then he  
17 was helping us capture Eddie Archuleta, a federal  
18 SNM member.

19 Q. Did he provide accurate information in  
20 those two matters?

21 A. He did to the best of his ability. In the  
22 first matter, it was purely domestic, so we were  
23 just asking, "Who is this guy?" The victim wasn't  
24 someone I knew, and because he was from Las Vegas, I  
25 inquired about it. And I did that with his

1 attorneys' permission.

2 And then the other matter, that fugitive  
3 was from Las Vegas, and it's a small town, so I was  
4 just asking if he knew where he hung out, and he  
5 gave us leads.

6 Q. And was there a discussion about why he  
7 was providing this information to you? In other  
8 words, was it in return for anything or --

9 A. No, I asked -- and I did that with his  
10 attorney's permission, just because it was a small  
11 town, and I thought he might have knowledge.

12 Q. You indicated that during this timeframe  
13 where these text messages and phone calls were going  
14 on, that he had some concerns about his safety; is  
15 that right?

16 A. He always has concerns about his safety.

17 Q. What kinds of concerns did he have in that  
18 regard that were communicated during these calls and  
19 text messages?

20 A. Just what travel looked like. How long he  
21 would stay, where he would stay. How he would get  
22 to and from the courthouse. He still lived up in  
23 the Las Vegas area. There was some discussion about  
24 per diem issues and then eventual relocation,  
25 although most of those conversations were with his

1 attorney being part of the phone call, as well.

2 Q. So some of these calls were three-way  
3 calls, or was Mr. Lucero in the presence of his  
4 attorney?

5 A. I think he was in the presence of his  
6 attorney.

7 Q. So some of these calls were concerning his  
8 request for per diem compensation for his time in  
9 court?

10 A. No, just how that worked, and I think the  
11 process was slow, the reimbursement checks and  
12 things like that, and where to send the check, and  
13 what I would call kind of administrative follow-up.

14 Q. So he wanted to know where his money was?

15 A. That's fair to say.

16 Q. And how much are we talking?

17 A. I'm not sure. Whatever the per diem rate  
18 is for witnesses.

19 Q. Now, he wasn't a witness called by the  
20 Government; right? He was a witness called by the  
21 defense.

22 A. I think at a motion hearing he might have  
23 been called by the defense, but I thought the  
24 Government called him during the trial.

25 Q. During the trial. Okay. But these calls

1 about his per diem -- they were during a motions  
2 hearing, as well?

3 A. I believe so.

4 Q. So he wanted the Government to pay him  
5 some money for his time in court?

6 A. I don't think that's fair. I think I was  
7 his liaison. I guess he could have called you  
8 directly, but he chose to text me.

9 Q. Okay. So let's back up a little bit. The  
10 grand jury subpoena that we're talking about -- why  
11 was that requested?

12 A. I believe Agent Stemo requested that, and  
13 it was to investigate whether or not there were  
14 potential threats to Mr. Lucero.

15 Q. And what did you all determine, based upon  
16 the materials subpoenaed by the grand jury? Were  
17 you able to confirm that he had received threats?

18 A. No, not from call detail records. That  
19 determination can't be made.

20 Q. Did you go through the call detail records  
21 with Mr. Lucero or Agent Stemo or someone else from  
22 the FBI?

23 A. I did not.

24 Q. The purpose of the phone call records is  
25 to identify who might have been making those phone

1 calls; right?

2 A. Correct.

3 Q. And the only way to do that is -- well,  
4 one is to check with Mr. Lucero and find out if he  
5 recognizes those phone numbers and whether they are  
6 in his cellphone with names on them; right?

7 A. That's one way.

8 Q. And was that done in this case?

9 A. I'm not sure.

10 Q. Did you ever confirm through your  
11 investigation that what Mr. Lucero had told you  
12 about receiving these threatening phone calls was  
13 true or accurate?

14 A. That's a question for Agent Stemo. I was,  
15 I think, in trial 3 during that period of time.

16 Q. Well, have you inquired or learned about  
17 that information since these trials?

18 A. I don't believe a suspect was identified.

19 Q. Prior -- well, would Agent Stemo have had  
20 phone calls and text messages as well with Mr.  
21 Lucero?

22 A. I believe so.

23 Q. And do those exist anymore, or has that  
24 phone been retired?

25 A. That phone was retired two phones ago,

1 yes.

2 Q. Would she have had more or less contact  
3 with Mr. Lucero than you did?

4 MS. ARMIJO: Objection, calls for  
5 speculation.

6 THE COURT: Well, if he knows, I'll let  
7 him answer. Overruled.

8 A. Maybe the best way to answer is that once  
9 I got rid of that phone number, none of the  
10 cooperating defendants have my phone number anymore.  
11 So when I got rid of that phone, I have had no  
12 telephone contact with any of the cooperating  
13 defendants.

14 BY MR. CASTLE:

15 Q. Between February and the end of trial  
16 number 2, would Agent Stemo have had more or less  
17 contact with Mr. Lucero than you did?

18 A. I imagine less.

19 Q. Did Mr. Lucero express specific -- during  
20 these conversations, did he express specific fear of  
21 any one or more of these individual defendants?

22 A. No. I can explain what I remember him  
23 expressing but --

24 Q. Please do.

25 A. Just more like annoying or harassing phone

1 calls. Almost like what I'd expect a teenager to do  
2 where you're prank-calling people, stuff like that.  
3 He would just get phone calls at odd hours and he  
4 would just -- no one would express a threat to him.  
5 It would just be like they were listening  
6 momentarily and then they'd hang up.

7 Q. Well, the grand jury, I think, subpoena  
8 was issued for possible filing of criminal charges  
9 of witness intimidation; is that right?

10 A. It could lead to that, yes.

11 Q. So what, if anything, did Mr. Lucero tell  
12 you that -- or tell the FBI generally that led them  
13 to believe that these calls could be evidence of  
14 witness intimidation?

15 A. He just reported that -- well, he reported  
16 a few things, but regarding telephone calls, like I  
17 just explained, he was getting odd and what he  
18 described as annoying or harassing phone calls.

19 Q. Did he indicate that he was afraid because  
20 of the phone calls?

21 A. He communicated a concern to me, and  
22 that's why we looked into it.

23 Q. What was the concern?

24 A. Fear.

25 Q. Did he indicate, because of this fear,



1 that he at any time was hesitant to come forward,  
2 testify, cooperate?

3 A. No.

4 Q. None of these defendants were living in  
5 the community during the time these phone calls were  
6 allegedly placed to Mr. Lucero; is that right?

7 A. That's correct.

8 Q. So of the 130 or so communications,  
9 between the phone calls and the text messages, that  
10 you had, how many of them were concerning issues of  
11 fear or concern that Mr. Lucero had?

12 A. Not very many.

13 Q. Can you give us a percentage?

14 A. How many were there, 100 --

15 Q. 130-odd communications.

16 A. Less than a dozen had to do with him  
17 expressing concern. The majority were  
18 travel-related, and then related to those other two  
19 matters I discussed.

20 Q. What percentage of those communications  
21 were about his money?

22 A. Less than a dozen.

23 Q. And would those have been both text  
24 messages and phone calls?

25 A. No, I think those would have been text

1 messages. I didn't --

2 Q. So if you can recall to the best of your  
3 memory, what was the basic gist of those text  
4 messages concerning the money?

5 A. How did he go about obtaining it.

6 Q. Okay.

7 A. What I thought would be on forms provided  
8 to him. I don't know what's provided to defense  
9 witnesses. But how he went about obtaining gas  
10 money reimbursement.

11 Q. It would basically be how much and how do  
12 I get it?

13 A. Yes.

14 Q. Concerning those two other matters, you  
15 said that he was accurate to the best of his  
16 knowledge. Okay? What do you mean by that?

17 A. He stayed away from SNM members when he  
18 got out, because he debriefed. But because he lived  
19 in a small town, I assumed that he would hear or  
20 give me some background on where these guys might be  
21 hanging out at. The SNM member that was murdered  
22 I'd never heard of, and so I was looking for some  
23 background information on the guy. He didn't seem  
24 to know much about him, either. I think he'd come  
25 through the state system and they were generations

1 apart.

2 As far as Eddie Archuleta, he knew a  
3 little bit about his family, so he was able to  
4 provide, I think, a mom and an aunt's general  
5 location.

6 Q. Did he indicate when was the last time he  
7 had contact with Mr. Archuleta?

8 A. He'd run into him in town somewhere and  
9 seen him, because he was able to tell us what kind  
10 of car he was driving. And at the time, Archuleta  
11 had two arrest warrants: One from the marshals and  
12 one from us. And the FBI arrest warrant was the  
13 result of him providing a location to either the  
14 marshals or the FBI, and then Archuleta got arrested  
15 with some crack cocaine, and that's how we adopted  
16 that case. So he had some background information on  
17 Archuleta's whereabouts.

18 Q. So he had had some contact with him since  
19 he had gotten out of prison, he had some contact  
20 with Mr. Archuleta enough to know what kind of car  
21 he drove and things of that nature?

22 A. Yeah. But I think he saw him in town at a  
23 grocery store or someplace like that. I wouldn't  
24 say it was significant contact. He just observed  
25 him enough to pass what he was driving.

1 Q. How did he know that he was an SNM member?

2 A. Because he'd been brought in in the feds.

3 Q. So this was -- when would he have been  
4 brought in in the feds, Mr. Archuleta?

5 A. I'm not sure of the dates. I know we have  
6 them recorded somewhere in reports, but I'm not  
7 sure. He's younger.

8 Q. Okay. So it would have been in the last  
9 five or seven years?

10 A. I think seven to ten. I think he was  
11 brought in by Fred Quintana, was one of his  
12 sponsoring members when Quintana was in the feds,  
13 and I think it's been some time.

14 Q. Would it have been since 2008?

15 A. Yes.

16 Q. Okay. Now there was an issue at trial.  
17 Mr. Lucero indicated that after 2008, he had stopped  
18 being a member of the SNM and associating with the  
19 SNM; is that correct?

20 A. I don't think I was here for all of his  
21 testimony, but I'll take your representation.

22 Q. Well, you were aware that at least the  
23 defense in this case by Mr. Garcia was that it was  
24 Mr. Lucero who had ordered the hits and was  
25 continuing to be a member of the SNM for quite some

1 time; is that right?

2 A. Yes.

3 Q. Did you record and/or preserve this  
4 information that Mr. Lucero was still privy to SNM  
5 business after 2008 and provide it to the Government  
6 in a 302 or anything else?

7 A. Well, my debrief of Mr. Lucero was  
8 recorded, and I turned that over, as well as my 302.  
9 I'm not sure if we discussed Eddie Archuleta in  
10 there. It's not unusual for ex members to keep tabs  
11 on the S, though.

12 Q. Okay. So was he telling you that he was  
13 keeping tabs on Mr. Archuleta as an ex member of the  
14 SNM?

15 A. No, that's just my observation and my  
16 opinion, that that's not unusual for ex members to  
17 keep tabs on the S.

18 Q. If you conduct an interview with a witness  
19 and you're going to talk about multiple different  
20 crimes that might not be related, do you at times  
21 separate the interview out so that there is perhaps  
22 a 302 for one case and another 302 for a different  
23 case?

24 A. Perhaps.

25 Q. Assume for a moment we don't have anything

1 concerning this Archuleta investigation in the  
2 discovery in this case. If you'd just assume that  
3 for a moment. Would Mr. Lucero -- would you have  
4 produced a 302 in the Archuleta matter concerning  
5 what Mr. Lucero told you?

6 A. You know, it depends. If he just tells me  
7 he's driving a gray BMW, I don't know that I would  
8 have written a 302 to that effect.

9 Q. Did you write one in this case in the  
10 Archuleta matter concerning what Mr. Lucero told  
11 you?

12 A. Agent Stemo may have, because she's the  
13 one that charged him and led that particular  
14 investigation of that defendant.

15 Q. Okay. So she charged who?

16 A. Archuleta with the crack cocaine  
17 distribution.

18 Q. Would there be any other 302s of  
19 Mr. Lucero that may be located in files that have  
20 not been produced to the defense?

21 A. I don't believe so. We tried to produce,  
22 reproduce, and triple produce 302s so that you have  
23 them.

24 Q. Did you ever see a 302 by Agent Stemo  
25 concerning her interview of Mr. Lucero on the

1 Archuleta matter?

2 A. No, not off the top of my head.

3 Q. And you're familiar with the discovery  
4 that's actually been produced in this case?

5 A. I try to be.

6 Q. Okay. So if that had been produced in  
7 this case, you'd be aware of it?

8 A. Yes, sir. I believe the Eddie Archuleta  
9 stuff was on the tablets and turned over because it  
10 became an issue at one point in the detention  
11 facility, some of his stuff being on there.

12 Q. Okay. So other than -- would I be correct  
13 that you had almost three hours of phone calls with  
14 Mr. Lucero between February 15 and May 3?

15 A. Did you say I had three hours of phone  
16 calls?

17 Q. Yes.

18 A. I find that hard to believe.

19 Q. Well, in your review of Motion Number  
20 2416, it was indicated that it was just short of  
21 three hours in total phone calls; is that right?

22 A. Text messages and phone calls, or just  
23 phone calls?

24 Q. Just phone calls. But I'll show you, if  
25 you can get past all the scribbles --

1 MS. ARMIJO: Can you give me a number?

2 MR. CASTLE: Yes, I will put it on the  
3 record. Page 3, Document 2416, subparagraph 6,  
4 letter C.

5 BY MR. CASTLE:

6 Q. The phone calls vary in length up to 25  
7 minutes in duration, just short of three hours in  
8 total. Do you see that?

9 A. Yes.

10 Q. And so in preparation -- well, attached to  
11 that motion was actually the phone call records;  
12 right? So you can review those if you wanted to.

13 A. Yes.

14 Q. And in fact, those are in discovery. They  
15 have been produced after trial; right?

16 A. Yes, sir.

17 Q. And so did you do anything to determine  
18 whether that was accurate or not, that your phone  
19 calls with Mr. Lucero in total lasted just short of  
20 three hours?

21 A. I did not. I guess I'm taking your  
22 representation that it was that long.

23 Q. Do you recall having a conversation with  
24 him that lasted 25 minutes or something along that  
25 length?



1 A. Yes.

2 Q. And what was that conversation about?

3 A. He went off the highway on his way home  
4 from here in Las Cruces. I guess he was pretty  
5 sick. He had some kind of stomach flu, or  
6 something, and he crashed his truck and hurt  
7 himself.

8 Q. Did he want reimbursement or help in  
9 repairing his truck?

10 A. I'm sure he did, but we didn't talk about  
11 that.

12 Q. So he didn't tell you, "Hey, look, I  
13 crashed this truck because I had to come to court,  
14 and the FBI should have to pay for it, or the  
15 Government in some fashion should have to pay for  
16 that"?

17 A. It's not an FBI issue.

18 Q. I know it may not be for you, but did  
19 Mr. Lucero ask?

20 A. No.

21 Q. Did he mention why he was asserting his  
22 Fifth Amendment right?

23 A. No, sir. And I'll add that his attorney  
24 was very aggressive and very candid with what he  
25 wanted me talking about and not talking about.

1 Q. Okay. So what did the attorney tell you?

2 A. "You can talk to him about his travel and  
3 his safety."

4 Q. Okay. And nothing else?

5 A. Correct, without him being involved in the  
6 conversation.

7 Q. And did he say why?

8 A. No, and I didn't ask. I respected his  
9 conditions, his instructions to me.

10 Q. And did he tell you that you're not to ask  
11 him anything about the case?

12 A. Absolutely. And he told that to the  
13 prosecutors, as well.

14 Q. And was that in the presence of  
15 Mr. Lucero?

16 A. He said it several times in the presence,  
17 and then he reminded us a couple of times on phone  
18 calls and outside -- in the hallway outside this  
19 courtroom. He was very passionate about, you know,  
20 representing Mr. Lucero.

21 Q. So during these phone calls or text  
22 messages, was there discussion by Mr. Lucero about  
23 what he wanted to be done so that he would be  
24 protected or so that he wouldn't be in fear?

25 A. No. He had his attorney. I can't say he

1 had his attorney. His attorney directed the  
2 majority of those conversations both with me and  
3 with the prosecutor. And then if there was specific  
4 follow-up, like, for instance, I said I would need  
5 to know the exact location that he intended to move,  
6 because we had to calculate that into moving costs.  
7 So there was a lot of back-and-forth on -- he had to  
8 be very specific.

9 Q. Did Mr. Lucero ever express a concern  
10 about whether he was going to be charged in this  
11 case during these conversations?

12 A. No, sir.

13 Q. He never mentioned once, "Am I going to be  
14 charged at all, or are you focusing on me as a  
15 suspect," or anything of that nature?

16 A. Well, you asked during this period, so I  
17 thought you meant --

18 Q. This conversation.

19 A. Post attorney. He didn't have those  
20 conversations with me post attorney. I think when I  
21 first met him, that was a concern.

22 Q. Okay. So let's talk about that a little  
23 bit. What did he tell you during that first time  
24 you met him in -- was it 2015, '16?

25 A. I think it was '16.

1 Q. '16. What did he tell you then?

2 A. He had some questions about -- from what I  
3 recall, he had some questions about the RICO  
4 statute.

5 Q. Okay.

6 A. And he wanted to make it well known to me  
7 that he had worked for Roundy, that he had debriefed  
8 with SIS in the BOP. So I took that to mean he was  
9 letting me know, hey, I'm not eligible for RICO; I'm  
10 out.

11 Q. So he was expressing to you in certain  
12 ways that because he had cooperated in the past,  
13 that he expected not to be charged with any crimes  
14 in relation to the RICO, what he considered the RICO  
15 investigation; is that right?

16 A. I feel he was -- thought he was educating  
17 me on those facts, yes.

18 Q. So in this conversation that he had with  
19 you, I take it he relayed to you that he already  
20 knew there was an investigation afoot to investigate  
21 the SNM?

22 A. Well, yes, sir. By the time I had my  
23 first conversation with him, I believe we'd already  
24 done the Phase 1 and perhaps the Phase 2 arrests.

25 Q. Was this conversation at his request, or

1 was it one where you approached him?

2 A. This was our initial meet at his house.  
3 We sat in his living room and I interviewed him and  
4 recorded a portion of that.

5 Q. But you initiated the contact with him?  
6 He didn't call you all up and say, "Come on over; I  
7 want to chat"?

8 A. Correct. I initiated it.

9 Q. Okay. And then you recorded a part of  
10 that, but not all of that; is that right?

11 A. Yes, sir.

12 Q. Would you have recorded the part where he  
13 was informing you that he, you know, had cooperated  
14 with Roundy in the past and that he expected not to  
15 be charged in the RICO?

16 A. No, and he didn't say he had that  
17 expectation. But my 302 details his former  
18 cooperation, because if I remember correctly, we  
19 went through some of his old debriefs where I  
20 thought information might not have been recorded  
21 correctly.

22 Q. Was it unusual for you to get text  
23 messages and phone calls from witnesses who  
24 testified in these trials?

25 A. Not at all.

1 Q. Would you get phone calls and/or text  
2 messages from witnesses who were in prison, other  
3 than the infamous one that we kind of --

4 A. Well, I think Eric Duran sent me some text  
5 messages against my wishes, and I think we've  
6 discussed those. I would get -- yeah, I would  
7 get -- I was the lead point of contact with many of  
8 these witnesses for the Government, so I would...

9 Q. And were these individuals represented by  
10 counsel?

11 A. The majority were.

12 Q. And did their attorneys and you have  
13 similar conversations about the limits put on phone  
14 calls such as you had with counsel for Mr. Lucero?

15 A. Yes, sir. At every debrief I would bring  
16 this up, and if the prosecutors forgot, I would  
17 remind them that we needed to establish the  
18 protocols for that, and those discussions always  
19 happened.

20 Q. And just generally speaking -- I don't  
21 want to go into each one -- would the phone calls  
22 that these other witnesses would make -- would they  
23 be similar, you know, "Where is my money? How am I  
24 going to be protected? Here is my fears. Here's my  
25 concerns." Those kinds of things?

1           A.     The fears and concerns were usually  
2 relayed through the attorneys, which was better.  
3 What I communicated was that if their families had  
4 problems on the outside, rather than go through the  
5 attorney, they were welcome to call me. And I made  
6 that offer in front of the Government and their  
7 attorneys so everyone knew. And then if the  
8 witnesses were on the outside, I would just get  
9 permission to coordinate travel and security for the  
10 witnesses and the attorneys, to a T, were all  
11 agreeable to that.

12           Q.     Specifically with regard to trial number  
13 2, Sammy Griego was an individual who was living in  
14 the community at the time he testified; is that  
15 right?

16           A.     Yes, sir.

17           Q.     Did he also communicate with you by text  
18 or phone?

19                   MS. ARMIJO: Objection, relevance.  
20 Fishing expedition now.

21                   THE COURT: Tie that to your motion.

22                   MR. CASTLE: Well, we requested in our  
23 motion disclosure and discovery of other statements  
24 made by witnesses in the case, and so this is a  
25 witness in the case.

1 THE COURT: Well, I did see that in there.  
2 It did perk up my ears, because it did look like it  
3 was broadening the motion, so overruled.

4 Mr. Castle.

5 MR. CASTLE: Thank you, Your Honor.

6 A. To be clear, sir, I believe I was the lead  
7 point of contact for all of the witnesses out of  
8 custody communicating, coming to court in response  
9 to the subpoenas.

10 BY MR. CASTLE:

11 Q. So would Sammy Griego have text messaged  
12 you and made phone calls to you before, in the  
13 months leading up to his testimony?

14 A. Yes, sir.

15 Q. What were the general nature of his text  
16 messages and phone calls?

17 A. The same thing as Mr. Lucero's. "Where am  
18 I going? "Do I really have to go to Las Cruces,  
19 just being that it's a further drive?" And a lot of  
20 these guys didn't have a lot of funds. So, yeah, of  
21 that nature. "What hotel and how do I get there."

22 Q. "Where is my per diem or money?"

23 A. If I remember correctly, Griego was able  
24 to go to the marshals as soon as he was done here,  
25 and I think they were able to drive him. I would



1 oftentimes, as you recall, get up and walk out with  
2 them, and I'd make that introduction, and then come  
3 back in.

4 Q. Did Mr. Griego, in these conversations,  
5 indicate that he was afraid at all?

6 A. He didn't report getting weird phone calls  
7 or people, you know, driving by his house or  
8 squealing tires, no, but I mean, he had a healthy  
9 fear of the SNM in general.

10 Q. Did Griego also make statements to you  
11 about any concern that he might be part of the RICO  
12 or get charged in the RICO?

13 A. Only when we first met. And he, as you  
14 recall, cooperated right away. I met him at his  
15 parole office very early on, because he received one  
16 of the original letters that went out.

17 Q. He received a letter? What kind of  
18 letter?

19 A. From Baby Rob and Roy to hit the  
20 Secretary.

21 Q. Oh, those letters.

22 A. Yes, sir.

23 Q. Not from the Government.

24 A. I'm sorry?

25 Q. Not from the Government?

1 A. No, we had an in-person meeting.

2 Q. Can you think of any of the other  
3 witnesses who provided direct testimony against  
4 Mr. Billy Garcia that were out of custody at the  
5 time of the testimony, other than Mr. Lucero and  
6 Mr. Griego?

7 A. Mr. Armijo.

8 Q. Oh, right. Jacob -- Manuel Jacob Armijo?

9 A. Yes, sir.

10 Q. Did he have text message or voice  
11 communications with you?

12 A. Yes, sir. I would keep him abreast of  
13 when he needed to show up and if there were delays,  
14 as you know there were, just updates on when to be  
15 here.

16 Q. Did he have any other concerns?

17 A. He did, and we did. And I believe we  
18 disclosed this. We gave him -- I gave him money to  
19 purchase surveillance cameras for his house.

20 Q. Yes.

21 A. So he did express that, and he felt it  
22 could be mitigated by having the surveillance  
23 cameras, and we gave him funds for that.

24 Q. Did he make any other requests for funds  
25 that were either accepted or rejected?

1 A. Not that I recall, no.

2 To finish answering your question, you'd  
3 have to help me remember who else testified  
4 regarding Mr. Garcia. But I want to be clear, I was  
5 the point of contact for basically all of the  
6 witnesses for the Government.

7 Q. Have you made contact with Mr. Lucero  
8 since the filing of this motion?

9 A. No, sir.

10 Q. Are you aware of anyone who has had  
11 contact with him since the filing of this motion  
12 that works for the FBI or the Government?

13 A. No, sir.

14 Q. So there has been no attempt to see if he  
15 has the text messages still on his phone?

16 A. No, sir. I was not asked to do that.

17 Q. In reviewing Exhibit B, would it be  
18 accurate that at least as of May 15 of 2018,  
19 Mr. Lucero's phone was still operational?

20 A. Yes, sir. You have call detail records,  
21 so yes.

22 Q. Do you have any knowledge whether he had  
23 destroyed his phone?

24 A. I have not talked to him since that trial,  
25 sir, so I don't know.

1 Q. Same thing with Mr. Armijo and Mr. Griego.  
2 Do you have any knowledge whether they still have  
3 the content of any text messages you had?

4 A. I have no knowledge of that, and I have  
5 not talked to them about text messages.

6 Q. I've just been reminded there was another  
7 witness who was out of custody, Julian Romero; is  
8 that right?

9 A. Yes, sir.

10 Q. And you just forgot about him, and so did  
11 I; right?

12 A. Yes, I'm sorry.

13 Q. Nobody was -- yeah, right. Again, did you  
14 have similar conversations, text messages, cellphone  
15 calls with Mr. Romero?

16 A. Yes, but it usually went through his wife  
17 because he didn't have his own phone. She was kind  
18 of the keeper of the phone in their family.

19 Q. I could ask you some follow-up questions  
20 on that, but I think they'd be irrelevant.

21 MR. CASTLE: If I could have a moment,  
22 Your Honor.

23 THE COURT: You may.

24 BY MR. CASTLE:

25 Q. Agent Acee, when you were testifying

1 earlier about Mr. Lucero expressing some fears in  
2 regards to annoying calls and prank calls -- is that  
3 right; do you recall that?

4 A. Yes, sir.

5 Q. I believe you testified that he reported a  
6 few things to you. Do you recall what those few  
7 things were?

8 A. Yes, sir. So in addition to the phone  
9 calls, like screeching tires around his house, like  
10 people peeling out -- and again, I thought that's  
11 kind of -- maybe you don't want my thoughts on it.  
12 But -- so the phone calls, the screeching tires.  
13 And then his wife had her purse stolen from their  
14 car, and he was concerned about that, because it had  
15 their checkbook and her identifying documents.

16 Q. And did he ask for help in investigating  
17 that purse theft?

18 A. No. He was just making us aware of it.

19 Q. And so whether or not Mr. Lucero's phone  
20 records show, one way or the other, whether he was  
21 being accurate regarding these unidentified calls to  
22 him, we'd have to talk to Agent Stemo; is that  
23 right?

24 A. No, you might get more information from  
25 her, but she told me that there were phone calls

1 when he indicated there were phone calls, but that  
2 doesn't take us one way or the other.

3 Q. Did anybody ever examine his phone?

4 A. I'm not sure. I did not.

5 Q. Was there any indication that, you know --  
6 his phone was a cellphone; right?

7 A. Yes, sir. He may also have a land line,  
8 but this is a cellphone.

9 Q. And you're pointing to Exhibit B; is that  
10 right?

11 A. Correct.

12 Q. So did he indicate, "Here are the calls  
13 that are unidentified on my phone, and these are the  
14 ones I'm concerned about"?

15 A. I'm not sure. He did not to me.

16 Q. Did he indicate when these -- generally  
17 when these calls occurred? Was it before he  
18 testified?

19 A. I'm not sure of that, but he gave some  
20 indication to Agent Stemo when the calls were,  
21 because she knew what to subpoena.

22 Q. And would they have all been from the same  
23 number or different numbers?

24 A. I think different numbers or blocked  
25 numbers.

1 Q. And did the subpoena get records that were  
2 both blocked numbers and unblocked numbers?

3 A. I believe so. I mean, when we asked for  
4 call detail records, a lot of times, from my  
5 experience, block numbers -- what shows up as  
6 blocked on your hand set will show up in the call  
7 detail records with the actual number.

8 MR. CASTLE: I have no other questions,  
9 Your Honor.

10 THE COURT: Thank you, Mr. Castle.  
11 How about any of the other defendants?  
12 Y'all all joined the motion. Anybody else want  
13 direct examination of Mr. Acee?

14 All right. Ms. Armijo, do you have  
15 cross-examination of Mr. Acee?

16 MS. ARMIJO: May I approach the witness,  
17 Your Honor?

18 THE COURT: You may.

19 CROSS-EXAMINATION

20 BY MS. ARMIJO:

21 Q. Now, Agent Acee, I think that when you  
22 started, you were talking about how there's three  
23 different types of records: Nontransitory,  
24 transitory, and non -- I wrote "record." Is it  
25 "nonrecord" or -- do you remember the three

1 different categories? And I think Mr. Garcia  
2 started you on nontransitory. I wanted to go back  
3 and talk about the three different types of  
4 recordings. Do you recall that in your early  
5 testimony?

6 A. I do.

7 Q. Okay. Can you explain to us those  
8 categories and what they are?

9 A. Yes. Do you mind if I use the policy  
10 guide to --

11 Q. No. And I just wanted to get the number.  
12 Do you have a copy of the policy guide there?

13 A. I do.

14 Q. Is that Exhibit A?

15 A. I don't have Exhibit A, but it's the same  
16 as Exhibit A. It's the policy guide.

17 Q. Okay.

18 A. It's actually what Mr. Castle attached to  
19 his motion. I have that. And the policy guide has  
20 not been updated, so that's the correct one.

21 Q. All right. And if you could refer us to  
22 the correct page on that, just so that we're clear.

23 A. Sure. So this is the FBI's Records  
24 Management Policy Guide. It was last updated June  
25 4, 2015. And I'll start on page 11.



1 Q. Of the guide?

2 A. Yes, ma'am.

3 Q. Okay.

4 A. There it provides the definition of a  
5 nontransitory record, and it's identified as needed  
6 for no more than 180 days, and it gives examples of  
7 what a nontransitory record is. Did you want me to  
8 read those?

9 Q. Well, and can you tell us your general  
10 understanding of it? And I think that's the one  
11 that we've been talking about; correct? In general?

12 A. Yes, so it talks a lot about policy, and  
13 then what I'll call administrative functions of the  
14 FBI that need to be preserved. But in my line of  
15 work as a case agent, what's most important is  
16 substantive documentation that has important or  
17 valuable evidentiary information, and so...

18 Q. What's your understanding of that?

19 A. Well, I wanted to give you an example, if  
20 I could. Like my interactions with the FBI  
21 laboratory, when I have something sent to the lab.  
22 This is the most frequently used example of this.  
23 So I send an item to undergo fingerprinting or DNA  
24 testing. The lab responds with an email, and that  
25 email response is their findings as well as their

1 official report. So that, to me, is a nontransitory  
2 record that I then flag with the case number and it  
3 goes into Sentinel, which is our report system. So  
4 that's to give you a real life application of a  
5 nontransitory record.

6 Q. Okay. Now, were any of the text messages  
7 that you had with Leroy Lucero during the time  
8 period indicated -- which I believe is starting at  
9 February 15 -- were any of those communications in  
10 this category of nontransitory record, as you  
11 understand it?

12 A. No, none of them were.

13 Q. Now let's go to the transitory record just  
14 so we make clear what they are. What is a  
15 transitory record?

16 A. This is a record that has minimal  
17 documentary or evidentiary value and is needed for  
18 180 days or less. I don't know that I've ever used  
19 this category. Because to me it's either  
20 evidentiary and I'd rather err on the side of  
21 caution and make it nontransitory and I save it, and  
22 someone else, such as yourself, can determine  
23 whether it's important or not. So I either will use  
24 the nontransitory or the nonrecord. But this  
25 generally applies to administrative functions of the

1 Bureau. So something that they need to preserve for  
2 a short period of time. And in my case as an agent,  
3 I think it again is either something I need to  
4 preserve for another entity to determine if it's  
5 relevant, or it's simply not; it's communications  
6 that aren't a record.

7 Q. Okay. And what about the last category,  
8 the nonrecord, which I believe would be on page 12  
9 under 4.5; is that correct?

10 A. That is correct, and this is any material  
11 that does not meet the statutory definition of a  
12 record as set forth in 44 USC Section 3301. And it  
13 gives examples of nonrecords.

14 Q. Okay. And so for nonrecord  
15 communications, those are not required to be saved?

16 A. That's correct.

17 Q. Now, I believe you already talked about  
18 the types of communications that you had with  
19 Mr. Lucero. Which category would you put those in  
20 as far as your text messages?

21 A. They were all nonrecord.

22 Q. And I believe you talked about and you  
23 described his attorney as very passionate and  
24 aggressive.

25 A. Yes.

1 Q. And can you explain that a little as far  
2 as -- well, let me back up with that. After you  
3 initially spoke to Mr. Lucero, did you have a belief  
4 that he would be a witness potentially in these  
5 trials?

6 A. Yes.

7 Q. Was he also on supervised release at the  
8 time initially?

9 A. Yes.

10 Q. And did he have an attorney?

11 A. He did.

12 Q. Did that attorney express concerns to you  
13 about his safety and his testimony?

14 A. Yes.

15 Q. Now, were you present when Mr. Lucero came  
16 and at the instruction of his attorney he initially  
17 invoked his Fifth Amendment right?

18 A. I was.

19 Q. After that invocation, was Mr. Lucero --  
20 was there continued discussion as to whether or not  
21 he would testify as a witness?

22 A. There was, but I wasn't on the tube line  
23 with those conversations. Your office and his  
24 attorney were.

25 Q. And you beat me to the next question. Was

1 that an issue that was dealt with between the  
2 attorneys as opposed to you as an agent?

3 A. Yes.

4 Q. And eventually, did Mr. Lucero's attorney  
5 allow him to testify?

6 A. Yes.

7 Q. Now, and did he, in fact, testify in this  
8 case?

9 A. Yes, he did.

10 Q. Was he around in the Las Cruces area for  
11 at least a day or two, as you may recall?

12 A. I believe it was several days, because  
13 there were some delays.

14 Q. And you indicated that he was in a car  
15 accident on the way home from court?

16 A. Yes.

17 Q. Do you recall which time that was?

18 A. I believe that was after motions hearings,  
19 not the trial.

20 Q. And did he call you after that?

21 A. He did.

22 Q. Were there also -- and you also talked  
23 about issues with his per diem. Are you aware of  
24 witnesses that are not -- that are just civilian  
25 witnesses that come to court, by either party, if

1 they get a per diem by the US Marshal Service?

2 A. They do.

3 Q. And was that the per diem that you were  
4 talking about as far as with witnesses?

5 A. Yes.

6 Q. Now, as far -- is there any other guidance  
7 in Exhibit A that you used as far as when you would  
8 have to reserve text messages and emails that you  
9 used for guidance?

10 A. Yes. There are other relevant points to  
11 this policy that I think I was within in my review  
12 of it.

13 Q. Okay. And can you please point us to what  
14 page that is and what policy?

15 A. Sure. The policy guide we were just  
16 talking about.

17 Q. Which is Exhibit A, for the record?

18 A. Yes. I would have you turn to page 25,  
19 where it talks about nonrecord emails. And  
20 understand, the policies are a little dated here.  
21 They mostly deal with emails, but I'm considering an  
22 email to be a text message, as well, because I think  
23 the policy should probably fit both. If it's good  
24 for email, it should be good for text. And in my  
25 reviewing the nonrecord emails and the examples,

1 this clearly fit within it. The communications with  
2 the witnesses on how to get to court, what day to be  
3 here, and at what time are, my reading of the  
4 policy, clearly nonrecord emails or communication.

5 Q. And so you were following, just so we're  
6 clear, 4.8.19 of Exhibit A, which is nonrecord  
7 emails, and you were applying it to text messages?

8 A. Correct.

9 Q. All right. And is there another policy  
10 that you used in this exhibit, as well, or is that  
11 primarily it?

12 A. Out of this exhibit, that's primarily it.

13 Q. Okay. Was there anything else that you  
14 used for guidance?

15 A. I did. In another area of our policy, I  
16 was looking for the definition of substantive  
17 communications. And I wanted to bring the policy  
18 guide, but was not able to, because I'm not able to  
19 divulge it, in whole or in part, without Department  
20 of Justice permissions.

21 Q. Okay.

22 A. I did, however, find an online reference  
23 to it in the Hillary Clinton email OIG  
24 investigation, and the policy is quoted in there,  
25 and I provided that to you for your reference.

1 Q. All right.

2 MS. ARMIJO: And so, Your Honor, the  
3 United States would like to mark as Exhibit Number 1  
4 a public document that was by OIG into evidence,  
5 which contains policies that Special Agent Acee has  
6 relied upon that are in this document that he can  
7 point to that otherwise we don't have permission to  
8 publish it, other than in this public document.

9 THE COURT: Any objection, Mr. Castle?

10 MR. CASTLE: I do, because I don't believe  
11 the witness has testified that he relied upon this  
12 at the time that he had his phone destroyed. It  
13 sounds like to me that his testimony is he's been  
14 told about it after the motion was filed, which  
15 isn't really relevant as to his conduct at the time  
16 of destruction.

17 MS. ARMIJO: I can ask some more  
18 questions, Your Honor, to lay some foundation.

19 THE COURT: Go ahead.

20 BY MS. ARMIJO:

21 Q. Are there policies in this document that  
22 you're aware of before either of your two previous  
23 phones were destroyed?

24 A. Yes.

25 Q. Were you aware of those policies before



1 your phones were taken from you and destroyed?

2 A. Yes.

3 Q. Did you rely on those policies in the  
4 actions that you took in reference to the phones  
5 issued to you by the FBI?

6 A. Yes.

7 Q. Are the policies in Government's Exhibit 1  
8 the same policies that you relied upon for the  
9 actions that you took which are the subject of this  
10 motion?

11 A. Yes.

12 MS. ARMIJO: The United States would move  
13 for the admission of Exhibit Number 1.

14 THE COURT: Any further objection, Mr.  
15 Castle?

16 MR. CASTLE: No, Your Honor.

17 THE COURT: Any other defendant have any  
18 objection?

19 Not hearing any, Government's Exhibit 1 to  
20 Document Number 2416 -- can I write that on your  
21 Exhibit 1?

22 MS. ARMIJO: Yes, Your Honor. Thank you.

23 THE COURT: I'm going to put 2416.

24 All right. So Government's Exhibit 1 to  
25 Document 2416 hearing will be admitted into

1 evidence.

2 (Government Exhibit 1 admitted.)

3 BY MS. ARMIJO:

4 Q. All right. And Agent Acee, in this  
5 document, can you please point us to the relevant  
6 portions?

7 A. I can.

8 MS. ARMIJO: And may I approach him with a  
9 copy of it, Your Honor?

10 THE COURT: You may.

11 MS. ARMIJO: So you can have the original.

12 BY MS. ARMIJO:

13 Q. And can you please explain what document  
14 this is, again?

15 A. This is the U.S. Department of Justice  
16 Office of the Inspector General Report of  
17 Investigation Recovery of Text Messages from Certain  
18 FBI Mobile Devices, and this pertained to the  
19 much-reported investigation of the Hillary Clinton  
20 emails and text messages between two FBI employees.

21 Q. And so what, in general -- and this  
22 document was made public; is that correct?

23 A. Yes, ma'am.

24 Q. And so --

25 A. Portions are -- I'm sorry to interrupt

1 you. It was made public, but portions are redacted  
2 by the DOJ.

3 Q. All right. And if you can, in Exhibit  
4 Number 1, tell us by page number which are the  
5 portions of the policy that you were referring to  
6 that you are aware of that you were acting in  
7 accordance with when your telephones were destroyed.

8 A. I would turn to page 5. So I want to be  
9 clear that I'm going to reference FBI policy, but  
10 much of this report pertains to not FBI agents, but  
11 FBI executive management, who -- we all fall under  
12 the same policies, but I noticed -- well, some of  
13 those folks had different phones than agents have,  
14 and it looked like maybe some different capabilities  
15 than we have.

16 Q. So they had better phones?

17 A. I believe so. Phones I didn't know -- for  
18 example, the FBI doesn't typically use the Apple  
19 phones, but these people had the iPhones. I wasn't  
20 aware, because we were told that we can't use those.

21 Q. Okay. If you could go to page 5, did you  
22 indicate?

23 A. Yes, toward the middle of the page.  
24 Actually toward the bottom there are some bullet  
25 points there, where it defines, according to policy,

1 what substantive communications include.

2 Q. Okay. And under this, there is a policy.  
3 It says "DOJ Policy and Guideline Regarding  
4 Electronic Messaging Records Retention"; is that  
5 correct, on page 5?

6 A. Yes, and then under that in bold it talks  
7 about FBI policy regarding the collection and  
8 retention of text messages. So the bullet points  
9 are kind of what highlights what follows in the next  
10 paragraph in my reading.

11 Q. Okay.

12 A. But it is substantive communications,  
13 those that we need to preserve, and then upload into  
14 Sentinel, so that they're in the report database or  
15 factual information about investigative activity.  
16 Factual information obtained during interviews or  
17 interactions with victims, including victims,  
18 potential witnesses, experts, informants, or  
19 cooperators; factual discussions related to the  
20 merits of evidence; factual information or opinions  
21 relating to the credibility or bias of a witness,  
22 informant, or potential witness; and other factual  
23 information that's potentially discoverable under  
24 Brady, Giglio, Rule 16, or Rule 26.2, which is the  
25 Jencks Act.

1 THE COURT: Ms. Armijo, I need to look for  
2 a break to give Ms. Bean a break. Is this okay?

3 MS. ARMIJO: This is okay. I believe we  
4 may be having some Elmo issues, so maybe we can deal  
5 with that then.

6 THE COURT: Didn't they use this courtroom  
7 since we were last here? Let's shoot for 15  
8 minutes, see if we can get everybody in and out.  
9 We'll be in recess for 15 minutes.

10 (The Court stood in recess.)

11 THE COURT: All right. It looks like  
12 everybody has an attorney. Look around. Help your  
13 friends out. Everybody have an attorney? All the  
14 defendants are in? I don't recognize everybody  
15 without their ties and haircuts. You look a little  
16 different over here today.

17 All right, Mr. Acee, I'll remind you  
18 you're still under oath.

19 Yes, Mr. Lowry.

20 MR. LOWRY: Your Honor, I was wondering  
21 if -- I'd ask for a privilege to have one of the  
22 hands released so the guys can take notes.

23 THE COURT: Any objection from the  
24 marshals that they can have one hand uncuffed?

25 MR. MARSHALL: Your Honor, I was informed

1 that we just don't have the security personnel here  
2 today to be able to accommodate that.

3 THE COURT: All right. Well, maybe you  
4 can talk to them about getting enough security in  
5 here so we can get them, but we may talk to them  
6 during the break. Okay?

7 All right. Mr. Acee, I'll remind you're  
8 still under oath.

9 Ms. Armijo, if you wish to continue your  
10 cross-examination.

11 We didn't get monitors in here. I  
12 apologize. We got in here this morning, there  
13 weren't any computers in here. We had to set them  
14 up for clerks. Didn't have enough wires for the  
15 real-time for me. So I don't know what happened as  
16 far as setting up. So if you decide you need to see  
17 exhibits, we can move people into the jury box so  
18 they can use those monitors. But let's see how it  
19 goes for a while.

20 All right, Ms. Armijo.

21 MS. ARMIJO: All right.

22 BY MS. ARMIJO:

23 Q. And Agent Acee, I believe we were on  
24 Government's Exhibit 1 on page 5; is that correct?

25 A. Yes.

1 Q. And we were talking about it, and you were  
2 discussing different categories of information that  
3 would be needed, is your interpretation. So with  
4 this category here, the factual information, would  
5 that be information that is in the nontransitory  
6 category?

7 A. No, nonrecord.

8 Q. Nonrecord. I'm sorry. Nonrecord. All  
9 right. And is there anything else in this document  
10 that you relied upon regarding the FBI policy  
11 regarding the collection and retention of text  
12 messages?

13 A. No.

14 Q. And is there a definition of substantive  
15 communication on page 6 of that exhibit?

16 A. Yes.

17 Q. And is that something that you relied upon  
18 as well?

19 A. It is. And I just summarized it in the  
20 bullet points on the previous page.

21 Q. Okay. Just so that we're clear, in this  
22 investigation in Exhibit 1, were they able to obtain  
23 old messages, emails, or text messages? I should  
24 just use the term data.

25 A. In the OIG investigation?

1 Q. Yes.

2 A. Yes, they were.

3 Q. But did they actually have the phones in  
4 which to do it?

5 A. Yes, and a contractor from the Department  
6 of Defense that was able to extract it from the  
7 iPhone.

8 Q. Now, your previous phones -- you mentioned  
9 one was the Galaxy S5?

10 A. Correct.

11 Q. Then what was the second phone?

12 A. Galaxy S7.

13 Q. Okay. And both of those phones were  
14 turned over and subsequently destroyed?

15 A. Correct.

16 Q. Per FBI usual procedure?

17 A. Yes. I have no dealings or influence over  
18 that.

19 Q. Now, has this case been unusual in that  
20 you would receive throughout the course of the  
21 pending of this case and even more so during the  
22 trials, numerous requests for information?

23 A. That's true.

24 Q. And in fact, did you have any -- what was  
25 the FBI, at your instruction as far as the agents



1 and anyone under you -- what was your instructions  
2 to them as far as requests?

3 A. Turn it over.

4 Q. Did that include notes that you have?

5 A. Yes. It was easy for us, the FBI, because  
6 if we gave you guys everything, then we've met our  
7 obligation.

8 Q. And you talked a little bit about Eddie  
9 Archuleta. Was he part of the cases as far as the  
10 overall SNM investigation, but was his case a  
11 nonracketeering charge?

12 A. Yes. He's what I previously described as  
13 a one-off. It's all under Operation Atonement but  
14 not related to this particular group of defendants.

15 Q. And did you already have an opportunity to  
16 tell us all of -- I know that we talked about the  
17 squealing cars and Mr. Lucero's car being broken  
18 into and the phone calls. Was there anything else,  
19 as far as threats or anything that Mr. Lucero  
20 indicated to you that he was in fear of?

21 A. No. The only thing you missed was, he was  
22 in a car accident, a pretty significant car crash.

23 Q. Did he -- and his indication of fear, was  
24 that something that was unusual, given the  
25 circumstances of this case and his testimony?

1 A. No.

2 MS. ARMIJO: May I have a moment, Your  
3 Honor?

4 THE COURT: You may.

5 MS. ARMIJO: Nothing further.

6 THE COURT: Thank you, Ms. Armijo.

7 Mr. Castle, do you have redirect of  
8 Mr. Acee?

9 MR. CASTLE: Yes, thank you.

10 THE COURT: Mr. Castle.

11 REDIRECT EXAMINATION

12 BY MR. CASTLE:

13 Q. Mr. Acee, you were indicating that you  
14 considered the text messages to be nonrecord; is  
15 that right?

16 A. Yes, sir.

17 Q. Can you go to the portion of the policy  
18 which is in Exhibit B that deals with -- defines  
19 nonrecord? I think it's 4.7 -- no, 4.5. I  
20 apologize.

21 A. Yes, sir.

22 Q. Does it have a definition, examples of  
23 what a nonrecord is?

24 A. Yes.

25 Q. And what are the examples?

1           A.     Library materials made or acquired and  
2     preserved solely for reference or exhibition  
3     purposes; stocks of publications or unprocessed  
4     blank forms; extra copies of documents preserved  
5     only for convenience or reference.

6           Q.     Okay. Anywhere in this policy does it  
7     give an example of a nonrecord that is in the form  
8     of either an email or a text message or, for that  
9     matter, the prosecution's Exhibit 1?

10          A.     I think it's covered in the first  
11     sentence, sir.

12          Q.     The first sentence being library  
13     materials?

14          A.     No, sir. That's the first bullet. A  
15     nonrecord is any material that does not meet the  
16     statutory definition of a record.

17          Q.     Okay.

18          A.     And then it gives examples, which I just  
19     read, but that doesn't cover all examples.

20          Q.     And where is "record" defined in that  
21     policy?

22          A.     44 USC, Section 3301.

23          Q.     Okay. And how is that defined?

24          A.     I'd have to read the statute, sir.

25          Q.     Okay. Well, there is a definition in the

1 policy under 4.2. Can you at least go to that  
2 portion of it, please?

3 A. Yes, sir. Would you like me to read it?

4 Q. If I can, for just a moment. What it does  
5 is, it follows the statutory definition of a record;  
6 right?

7 A. Yes, sir.

8 Q. And a record is all recorded information,  
9 regardless of form or characteristics, made or  
10 received by a federal agency, and then it goes on;  
11 is that right?

12 A. Yes, sir.

13 Q. So these text messages were recorded  
14 information, at least at one point; right?

15 A. Yes.

16 Q. And they were made or received by the FBI?

17 A. Yes, sir.

18 Q. So going back to what the definition of a  
19 nonrecord is, a nonrecord is material that does not  
20 meet the statutory definition of a record; is that  
21 right?

22 A. Yes.

23 Q. So how is it that a text message is a  
24 nonrecord?

25 A. That is a question for the policymaker,

1 sir, not me.

2 Q. Okay. So did you make a conscious  
3 decision to not keep the text messages with Mr.  
4 Lucero, Mr. Griego, and Mr. Armijo? Did you make a  
5 conscious decision not to retain those?

6 A. And Mr. Romero, Julian Romero. I made  
7 it -- if there had been substantive information  
8 there, I would have needed to make a report. And  
9 based on the fact that I didn't make a report, I  
10 guess I would agree with you that I did not.

11 Q. Let's go to substantive information.  
12 Would you agree that substantive communications  
13 include factual information about investigative  
14 activity?

15 A. Yes, sir.

16 Q. And Mr. Lucero gave you information  
17 concerning investigative activity that you were  
18 engaged in, namely the Archuleta investigation and  
19 this other investigation; is that right?

20 A. Yes. He had given me the make and color  
21 of his car, yes.

22 Q. And the text messages that you had with  
23 Mr. Lucero -- those were interaction with Mr. Lucero  
24 in some form?

25 A. Yes.

1 Q. And Mr. Lucero was a witness and  
2 cooperator?

3 A. At one time he was, yes.

4 Q. So going to Government's Exhibit 1, page  
5 5, it indicates that substantive communications  
6 include interactions with witnesses, including  
7 potential witnesses and informants; is that right?

8 A. Factual information obtained during  
9 interviews or interactions with witnesses.

10 Q. And then also you're required to retain  
11 substantive communications that might relate to the  
12 bias of a witness; is that right?

13 A. Yes, sir.

14 Q. Now, in this case, various parties, but  
15 mainly the Government, brought forth evidence before  
16 the jury concerning the fear of certain witnesses in  
17 this case; is that right?

18 A. Yes, sir.

19 MR. CASTLE: I have no other questions.

20 THE COURT: Thank you, Mr. Castle.

21 Do any of the other defendants have  
22 redirect of Mr. Acee?

23 All right, Mr. Acee, you may step down.  
24 Thank you for your testimony.

25 Mr. Castle, do you have further witnesses

1 or evidence you want to present on your motion?

2 MR. CASTLE: I have no further witnesses  
3 or evidence.

4 THE COURT: Ms. Armijo, does the  
5 Government have witnesses or evidence it wishes to  
6 present?

7 MS. ARMIJO: No, Your Honor. Thank you.

8 THE COURT: Do any of the other defendants  
9 have any witnesses or evidence they wish to present?

10 All right, Mr. Castle, if you wish to  
11 argue your motion at this time.

12 MR. CASTLE: Your Honor, if possible, I  
13 want to go back and reference some of the discovery  
14 materials, and I'd ask for permission to do it in  
15 writing within a reasonable period of time.

16 THE COURT: All right. Any objection to  
17 that, Ms. Armijo?

18 MS. ARMIJO: No, depending on if the  
19 United States has to respond, as long as it's in the  
20 time. I have a trial coming up that -- if we need  
21 additional time.

22 THE COURT: Any objection to that?

23 MR. CASTLE: No objection.

24 THE COURT: Any objection to that from the  
25 defendants? All right.

1           We'll work around your schedule,  
2   Ms. Armijo, if you desire to have any response. So  
3   you want to hold off on arguing in support of your  
4   motion?

5           MR. CASTLE: Yes, Your Honor.

6           THE COURT: Can I ask you a couple of  
7   questions so I have it in mind?

8           MR. CASTLE: Yes, Your Honor.

9           THE COURT: Now, where we stand, is there  
10   anything mechanical that the defendants are asking  
11   the Court to do, now that we've had Mr. Acee on the  
12   stand? It doesn't look like there is, A, anything  
13   to be produced; and B, it doesn't look like there is  
14   anything for in camera review. So it looks to me  
15   like this is mostly a Jencks violation motion. Am I  
16   characterizing things correctly?

17          MR. CASTLE: To some extent, yes, and no.  
18   Let me tell if you about the "no" part.

19          THE COURT: Take the first question. Is  
20   there anything mechanical that you're wanting the  
21   Government to do that they haven't done?

22          MR. CASTLE: I may. One of the things  
23   that I'm going to be checking on is that there was a  
24   reference to a 2016 interview of Mr. Lucero. Our  
25   cursory review of the discovery here in court



1 doesn't reflect that that's been produced. And  
2 so -- but it may very well have been produced. I'd  
3 rather, before I ask the Court for anything  
4 mechanical --

5 THE COURT: Do you know, Ms. Armijo, or  
6 Mr. Acee? Do you know on that single issue?

7 MS. ARMIJO: No, but I can find out about  
8 it.

9 THE COURT: I think you're about to get an  
10 answer right here.

11 MR. ACEE: Yes, sir. I recorded  
12 Mr. Lucero and I believe we played portions of it  
13 during the trial. I thought it was 2016.

14 MR. CASTLE: Like I say, Judge, I just  
15 want to make sure.

16 THE COURT: Okay. But other than that,  
17 you're not sitting here right this minute -- I'm not  
18 holding you to it, but you're not asking anything  
19 mechanical that you know from the Government as far  
20 as production or anything.

21 MR. CASTLE: That's correct, Your Honor.

22 THE COURT: And then, therefore, I can  
23 kind of drop out this in camera review, it looks  
24 like, correct?

25 MR. CASTLE: Yes.

1 THE COURT: So it looks like this is  
2 largely an alleged Jencks violation.

3 MR. CASTLE: Yes. We didn't know whether  
4 the phone calls had been recorded. The response  
5 said that the text messages had no longer been kept,  
6 so I wasn't going to ask for anything about the text  
7 messages. But now that we've heard that the phone  
8 calls weren't recorded, I don't think there is  
9 anything that the Court can look at in camera.

10 THE COURT: Okay. That's the way I was  
11 sizing it up, too. So we'll hold off on any further  
12 argument on that, Mr. Castle?

13 MR. CASTLE: Yes, Your Honor.

14 THE COURT: Anybody else on the defense  
15 side want to say anything toward that motion? I see  
16 shaking heads.

17 Ms. Armijo, is it all right to hold off on  
18 that argument?

19 MS. ARMIJO: Yes, Your Honor.

20 THE COURT: So we'll take up the second  
21 motion that I understand the parties have agreed  
22 would be next, and that's the Document 1841, which  
23 is Mr. Sanchez' motion to dismiss the case for the  
24 Government's outrageous misconduct in violation of  
25 the Brady versus Maryland case.

1 I think this was the motion that was filed  
2 back in March, and so kind of mid-trial or late  
3 trial or after the trial. I think it was an early  
4 March motion, so we've touched on this a little bit  
5 in the past. Ms. Jacks.

6 MS. JACKS: That's right, Your Honor.  
7 This is the motion regarding the pretrial interview  
8 of Lupe Urquizo, and this was the motion where Agent  
9 Sainato testified, in the hearing and at trial,  
10 about the fact that he was the FBI agent that  
11 participated in that interview and he took notes on  
12 his computer. And the 302 that was prepared omitted  
13 a lot of that information. That 302 was prepared by  
14 Nancy Stemo.

15 So what I asked to be able to do today was  
16 to essentially finish that hearing. We have Agent  
17 Sainato's testimony, and I actually brought a  
18 transcript of that for the Court.

19 THE COURT: Yeah, I think when I went back  
20 and looked at my notes on this, I think I have a  
21 65-page draft opinion on this, so we are pretty deep  
22 into this motion. I'm hoping to maybe crank that  
23 one out. But I wanted to hear what you had to say  
24 today.

25 MS. JACKS: Okay. What I'd like to do is,

1 I'd like to mark a couple of exhibits. I'd like to  
2 give the Court the testimony of Agent Sainato, and  
3 then I'd like to call Nancy Stemo. I saw she was  
4 here earlier. Is she available?

5 THE COURT: All right.

6 MS. JACKS: Did you want me to mark the  
7 Sainato testimony? I included everything. It's  
8 about 214 pages. Some of it is not pertinent to  
9 this motion, but I just wanted to be inclusive and I  
10 included everything.

11 THE COURT: I'm not particular. If you  
12 want to mark it all and there is no objection from  
13 the Government, I'll just take it and you can tell  
14 me what to look at, or I'll figure it out.

15 MR. CASTELLANO: May I approach counsel,  
16 Your Honor?

17 THE COURT: You may.

18 MS. JACKS: So Your Honor, my  
19 understanding is, there is no objection. How would  
20 the Court like me to mark that?

21 THE COURT: Why don't you mark this  
22 Defendant's Exhibit 1 to the hearing on 1841. Do  
23 you recall if there were any other exhibits when we  
24 did discuss this?

25 MS. JACKS: I do, and I brought them. I

1 mean, I brought identical copies of what those  
2 exhibits were.

3 THE COURT: Do you know what they were  
4 marked as?

5 MS. JACKS: I do. So that was the next  
6 thing I wanted to mark. The 302 that was prepared  
7 by Agent Stemo is Bates stamped 51485. That was  
8 defense Exhibit S, as in Sam, and I have a copy of  
9 that.

10 THE COURT: At trial or just for purposes  
11 of the hearing that we had on this motion?

12 MS. JACKS: I think both. Because I  
13 think --

14 THE COURT: We just kept the hearing?

15 MS. JACKS: -- Agent Sainato testified in  
16 the hearing about these exhibits and also in front  
17 of the jury.

18 THE COURT: May I make a suggestion? Why  
19 don't you put Trial Exhibit S, and then why don't  
20 you underneath it say "Exhibit A to Document 1841  
21 hearing," and that way I think that will be doubly  
22 clear. Does that work for you, Ms. Jacks?

23 MS. JACKS: That's fine. I just did that.

24 And then the other exhibit I have are the  
25 notes, the four pages of notes that were the notes

1 of Agent Sainato. That's Bates 54285 through 54288,  
2 and that was Trial Exhibit T.

3 THE COURT: Okay. You want to do it the  
4 same way?

5 MS. JACKS: Yeah.

6 THE COURT: Is this all right with you,  
7 Mr. Castellano?

8 MR. CASTELLANO: It is, Your Honor.

9 MS. JACKS: And I'm going to mark that as  
10 Exhibit B to the 1841 hearing. And then why don't I  
11 mark Sainato's testimony as Exhibit C?

12 THE COURT: All right. Sounds good. Do  
13 you want to move those for admission into this  
14 hearing?

15 MS. JACKS: Yes.

16 THE COURT: Any objection, Mr. Castellano?

17 MR. CASTELLANO: No, Your Honor.

18 THE COURT: All right. Exhibits A, B, and  
19 C to Document 1841 hearing will be admitted into  
20 evidence.

21 (Defendant Sanchez Exhibits A, B, and C  
22 admitted.)

23 MS. JACKS: We'd call Agent Stemo.

24 THE COURT: Since we're doing a separate  
25 hearing, I can't remember where we were on the

1 hearing before, but I'll ask Ms. Bevel to swear you  
2 in.

3 NANCY STEMBO,  
4 after having been first duly sworn under oath,  
5 was questioned, and testified as follows:

6 THE COURT: Ms. Stemo, Ms. Jacks.

7 MS. JACKS: Thank you, Your Honor.

8 DIRECT EXAMINATION

9 BY MS. JACKS:

10 Q. Good morning, Agent Stemo.

11 A. Good morning.

12 Q. Can you tell us what your occupation and  
13 assignment is?

14 A. I'm a special agent with the Federal  
15 Bureau of Investigation, assigned to the Albuquerque  
16 Field Office.

17 Q. And how long have you been a special  
18 agent?

19 A. Approximately two and a half years.

20 Q. And were you assigned to assist in the SNM  
21 investigation that resulted in these trials that  
22 have taken place in 2018?

23 A. Yes.

24 Q. When were you assigned to that  
25 investigation?

1 A. October 2016.

2 Q. So that was after the cases had been  
3 indicted?

4 A. I believe so.

5 Q. And you came on sort of in the middle of  
6 the case?

7 A. Yes.

8 Q. And were you the lead investigator in the  
9 case?

10 A. No.

11 Q. Who was?

12 A. Special Agent Bryan Acee.

13 Q. And is Agent Acee senior to you in the  
14 FBI?

15 A. Yes.

16 Q. Do you know by how many years?

17 A. I'd guess about five or six.

18 Q. Was Agent Acee the person that directed  
19 you and supervised you during the course of this SNM  
20 investigation?

21 A. Yes.

22 Q. Was there anybody else besides Agent Acee?

23 A. Aside from my actual supervisor?

24 Q. Who is your actual supervisor?

25 A. At the time, Special Agent Sonya Chavez.



1 Q. And was Special Agent Chavez involved in  
2 this SNM investigation?

3 A. She was our squad supervisor, so she  
4 oversaw everything on that squad including this  
5 investigation.

6 Q. Would you go to her -- if you had  
7 questions because you were new, if you had questions  
8 about policy or procedure, would you go to Agent  
9 Acee, Agent Chavez, or both?

10 A. Agent Acee.

11 Q. And in terms of your participation in this  
12 investigation, did you conduct interviews by  
13 yourself without Agent Acee present?

14 A. With other individuals, yes.

15 Q. You mean with other FBI agents?

16 A. Or task force officers.

17 Q. Okay. And in terms of when you would  
18 prepare reports such as an FBI 302, was that  
19 something that you would prepare and submit on your  
20 own, or would you prepare and submit it to Agent  
21 Acee for review?

22 A. It depends on the situation.

23 Q. Okay. So some of each?

24 A. Yes.

25 Q. I want to direct your attention to two

1 exhibits.

2 MS. JACKS: And Your Honor, if I can  
3 approach Agent Stemo?

4 THE COURT: You may.

5 MS. JACKS: For ease, can I refer to these  
6 as S and T?

7 THE COURT: You can. I think we'll know  
8 what they are. Do you mind adding maybe Trial  
9 Exhibit S and T to --

10 MS. JACKS: I'll try to do that.

11 BY MS. JACKS:

12 Q. Agent Stemo, do you recognize the  
13 documents I just gave you, Trial Exhibit S and Trial  
14 Exhibit T?

15 A. Yes.

16 Q. And can you tell me just briefly what each  
17 one of those is?

18 A. Trial Exhibit S is an FBI 302 written by  
19 myself regarding an interview with Lupe Urquizo.  
20 And Trial Exhibit T appears to be Agent Sainato's  
21 notes of that interview.

22 Q. You said it appears to be. Do you need to  
23 do anything to confirm that that, in fact, is what  
24 it is?

25 A. Do you mind if I read it?

1 Q. Not at all. Just let me know when you're  
2 done.

3 A. These are Agent Sainato's notes.

4 Q. So you told us that you came in in the  
5 middle of this investigation. When you would  
6 prepare to interview a witness or participate in a  
7 witness interview, did you review the indictment?

8 A. Yes.

9 Q. Did you review prior FBI investigation  
10 reports related to this investigation?

11 A. Yes.

12 Q. And did you speak to other people about  
13 what was going on in the investigation?

14 A. Yes.

15 Q. Primarily in terms of guidance about the  
16 importance of something to the investigation,  
17 primarily did you rely on conversations with Agent  
18 Acee, or were there other people that contributed?

19 A. I would primarily rely on the reports that  
20 were written.

21 Q. Okay. And then if you had questions or if  
22 you were -- if you wanted more details, who would  
23 you go to?

24 A. It would depend on who wrote that report  
25 or who was present for that.

1 Q. Okay. As an overview, according to your  
2 understanding, according to the Government's theory  
3 of the case, did Mr. Sanchez participate in the  
4 conspiracy and murder of Javier Molina?

5 A. Yes.

6 Q. And did he participate in those crimes,  
7 according to the Government's theory, by approving  
8 or authorizing the killing?

9 A. Yes.

10 Q. And did he also participate, according to  
11 the Government's theory of the case, by assisting  
12 and planning how the killing was going to happen?

13 A. Yes.

14 Q. And again, this is according to your  
15 understanding of the Government's theory of the  
16 case. Did Mr. Sanchez participate in the Molina  
17 murder by obtaining something from which weapons  
18 could be made?

19 A. I don't recall.

20 Q. Do you recall whether, according to the  
21 Government's theory of the case, Mr. Sanchez was the  
22 person who obtained a piece of Rudy Perez' walker to  
23 be fashioned into weapons with which to kill Molina?

24 A. I believe he was present when that  
25 conversation was had, but I don't know that he

1 actually held on to the piece.

2 Q. Okay. Is it your understanding, according  
3 to the Government's theory of the case, that  
4 Mr. Sanchez had some sort of conversation with Rudy  
5 Perez?

6 A. Yes.

7 Q. That caused him to provide a piece of his  
8 walker?

9 A. Yes.

10 Q. And finally, according to your  
11 understanding of the Government's theory of the  
12 case, did Mr. Sanchez participate in the Molina  
13 murder by assigning various roles to other  
14 individuals?

15 A. Yes.

16 Q. And if the Government proved that  
17 Mr. Sanchez did those things, would that show that  
18 he conspired to commit the murder of Javier Molina?

19 A. I don't believe that's up to me to decide.

20 Q. Was it -- that's fine. I accept that. I  
21 want you to take a look at Exhibit S. And I think  
22 you identified that as an FBI 302.

23 A. Correct.

24 Q. Did you prepare that exhibit?

25 A. I did.

1 Q. And when did you prepare it?

2 A. January 28, 2018.

3 Q. And the report was documenting an  
4 interview of Lupe Urquizo on January 22, 2018?

5 A. Yes.

6 Q. When in relation to the preparation of the  
7 report did you provide it to the Government  
8 prosecutors?

9 A. I don't have an exact date. It would be a  
10 matter of days after the report was approved.

11 Q. Within two or three days?

12 A. I would approximate less an week.

13 Q. How, just in general -- just sort of tell  
14 me what the chain of custody would be. You would  
15 write the report of the 302, and then who would you  
16 give it to?

17 A. It would need to get approved by someone  
18 in the FBI with approval authority.

19 Q. Okay.

20 A. Then I would -- more likely than not, I  
21 would email it to the AUSAs and the paralegals  
22 assigned to the case.

23 Q. Okay. So to the three prosecutors and  
24 paralegals that were assisting them?

25 A. Yes.

1 Q. And who was the person, if you know, that  
2 was reviewing the reports? Or was it always the  
3 same person or different people?

4 A. I don't know.

5 Q. There is not a section on that report that  
6 indicates who approved it? I'm talking about  
7 Exhibit S.

8 A. No.

9 Q. And when you provided the 302 to the  
10 Government prosecutors and paralegals, would you  
11 provide anything else with it on that email?

12 A. It depends.

13 Q. It depends on what?

14 A. If I have other reports to give to them,  
15 any attachments to the reports, I would provide  
16 those, as well.

17 Q. Okay. What about the notes? For example,  
18 when you interviewed a witness and took some notes  
19 and then prepared a 302, would you include those  
20 notes in the email?

21 A. Not necessarily, no.

22 Q. It would be a case-by-case basis?

23 A. Yes.

24 Q. Specifically with respect to Exhibit S,  
25 the 302 that you prepared about the interview of

1 Lupe Urquizo, did you forward anything else to the  
2 Government prosecutors at the time you gave them  
3 that 302?

4 A. Not that I recall.

5 Q. Is there something that would help you  
6 refresh your recollection? For example, a copy of  
7 the sent email, and look to see what attachments  
8 were there?

9 A. That could help.

10 Q. Do you know if you have that?

11 A. I don't know.

12 Q. Is that something you could check at  
13 lunch?

14 A. Yes.

15 Q. I'd like to ask you to take a look at the  
16 other exhibit up there. That's Trial Exhibit T.  
17 And can you tell us what that -- I think you've  
18 identified that as Agent Sainato's notes.

19 A. Correct.

20 Q. Of the January 22 Urquizo interview.

21 A. Right.

22 Q. Did you prepare those notes?

23 A. No.

24 Q. Have you seen those notes prior to today?

25 A. Yes.



1 Q. When?

2 A. When they were given to me in preparation  
3 for my 302 of that interview.

4 Q. Okay. Who provided them to you?

5 A. I believe it was Agent Sainato.

6 Q. And did Agent Sainato provide them to you,  
7 like, in physical form, or did he email them to you?

8 A. He must have emailed them.

9 Q. And why do you say that?

10 A. Because he was out of state and,  
11 therefore, the only way to get them to me was to  
12 either leave them on my desk or email.

13 Q. And so he couldn't have left them on your  
14 desk, because he wasn't physically present in New  
15 Mexico?

16 A. I believe he was out of state, yes.

17 Q. Okay. So your recollection is that you  
18 received an email with the notes from Sainato?

19 A. Yes.

20 Q. And that would have been sometime before  
21 January 28, 2018, when you prepared the 302?

22 A. Before or on January 28.

23 Q. Specifically directing your attention to  
24 Trial Exhibit T, did you provide those notes to the  
25 Government prosecutors and paralegals?

1 A. I don't think I did.

2 Q. And why do you say you don't think you  
3 did?

4 A. Because they're Agent Sainato's notes. I  
5 typically don't include notes that aren't mine. I  
6 guess it is possible, when we went through all of  
7 our records looking for handwritten notes of  
8 interviews, that I could have provided them, but I'm  
9 not sure if I did.

10 Q. Okay. But you had them when you prepared  
11 the 302?

12 A. Yes.

13 Q. So is it possible that you emailed those  
14 to the Government shortly after January 28 when you  
15 emailed them the 302?

16 A. It's possible, but I don't think I did.

17 Q. And is that something that you could  
18 potentially check over the lunch recess?

19 A. Yes.

20 Q. And correct me -- well, let me just go  
21 back. Do you have any specific recollection of  
22 providing those notes, Trial Exhibit T, to the  
23 Government prosecutors?

24 A. No.

25 Q. Do those notes look different than the

1 notes that you took during interviews?

2 A. Yes.

3 Q. And what's the difference? What's the  
4 main difference?

5 A. I typically handwrite my notes.

6 Q. And these notes are typed?

7 A. Yes.

8 Q. Agent Stemo, did you participate in the  
9 January 22, 2018, interview of Lupe Urquizo?

10 A. I did not.

11 Q. You weren't even in the room?

12 A. Correct.

13 Q. And can you tell us how it was that you  
14 came to write a 302 of a witness interview that you  
15 had nothing to do with?

16 A. Agent Sainato contacted me and told me he  
17 had not written the report, and it needed to be  
18 written to provide to defense in a timely manner,  
19 and he was out of state and did not have access to  
20 computers to submit the report.

21 Q. Now, Agent Sainato was a relatively new  
22 FBI agent, as well; right?

23 A. Yes.

24 Q. Who has more seniority? You or Sainato?

25 A. He does.

1 Q. He does?

2 A. Yes.

3 Q. And when he made this request of you, was  
4 it unusual?

5 A. Yes.

6 Q. And did you speak with anybody about what  
7 Agent Sainato was asking you to do?

8 A. I don't think I did.

9 Q. You don't think so?

10 A. No.

11 Q. So it's your recollection that Sainato  
12 asked you to write the 302, emailed you the notes,  
13 and then you did what he said?

14 A. Yes.

15 Q. Since you didn't participate in the  
16 interview, what did you rely on to prepare Trial  
17 Exhibit S, the FBI 302?

18 A. His notes and also the other 302s written  
19 on interviews by Lupe Urquizo.

20 Q. And the other 302s -- would that be an FBI  
21 302 from February 24, 2017; March 6, 2017; August  
22 22, 2017?

23 A. I'm not sure about the dates, but there  
24 were several.

25 Q. Just so we make sure the record is clear,

1 I'm going to grab those reports and show them to you  
2 to make sure.

3 MS. JACKS: I guess, Your Honor, I'd  
4 better mark these. So why don't I start with the  
5 FBI report dated February 24, 2017, Bates pages  
6 43636 and -637. That would be Exhibit D.

7 THE COURT: You're moving these admission?

8 MS. JACKS: I will so that the record is  
9 complete, if there is no objection.

10 THE COURT: Any objection, Mr. Castellano?

11 MR. CASTELLANO: If I can take a look  
12 after she finishes, I don't think there will be any  
13 objection.

14 THE COURT: All right.

15 MS. JACKS: That is a seven-page report  
16 dated March 6, 2017, that would be E; and a  
17 four-page report dated August 22, 2017, that would  
18 be F.

19 MS. ARMIJO: Your Honor, the Government  
20 has no objection.

21 THE COURT: Any objection from any of the  
22 other defendants?

23 All right. Not hearing any -- well, I  
24 guess Defendant's Exhibits D, E, and F will be  
25 admitted into evidence.

1 (Defendant Sanchez Exhibits D, E, and F  
2 admitted.)

3 MS. JACKS: Thank you. And may I approach  
4 Agent Stemo?

5 THE COURT: You may.

6 MS. JACKS: I apologize these aren't  
7 stapled.

8 THE COURT: Do you want a stapler?

9 MS. JACKS: Yes, that's probably better.  
10 Thank you.

11 BY MS. JACKS:

12 Q. Agent Stemo, I'm going to give you a  
13 minute to look at those Exhibits D, E and F. But my  
14 question is: Are those the FBI 302s that you  
15 reviewed and relied upon in preparing your January  
16 22, 2018, 302 for Lupe Urquizo?

17 A. Yes, they are.

18 Q. So those three documents, Exhibits D, E,  
19 and F, along with Agent Sainato's notes which are  
20 Trial Exhibit T -- those are the four documents that  
21 you relied on in preparing your 302, Exhibit S?

22 A. Yes.

23 Q. Okay. Was there anything else?

24 A. I don't think so.

25 Q. What about discussions with anybody? For

1 example, discussions with Agent Sainato?

2 A. No.

3 Q. What about discussions with Agent Acee?

4 A. No.

5 Q. What about discussions with either U.S.  
6 Attorney Beck or U.S. Attorney Castellano who were  
7 present during that interview?

8 A. I don't think U.S. Attorney Castellano was  
9 present. I guess it's possible, since I wasn't  
10 there. But no, I did not include those discussions  
11 in my 302.

12 Q. You mean you didn't rely on discussions  
13 with those individuals to prepare the 302?

14 A. No. Are you getting at the guidance?

15 Q. No, I'm talking about when you initially  
16 sat down and prepared the 302, which is Trial  
17 Exhibit S.

18 A. Yes.

19 Q. I think you said you relied on Sainato's  
20 notes, Trial Exhibit T; right?

21 A. Yes.

22 Q. And Exhibits D, E, and F, the prior  
23 interviews -- the 302s for the prior interviews of  
24 Lupe Urquizo.

25 A. Yes.

1 Q. What I'm asking you now is: When you sat  
2 down to initially prepare that 302, did you rely on  
3 conversations with anybody?

4 A. Regarding the facts?

5 Q. Regarding what happened on January 22  
6 during the interview of Mr. Urquizo when you weren't  
7 there.

8 A. No, those discussions aren't in the 302.

9 Q. Okay. My question is: Did you have those  
10 discussions?

11 A. We did have a discussion about what would  
12 be included in pretrial reports.

13 Q. Specifically with respect to preparation  
14 of the 302 that's Exhibit S. Prior to preparing it,  
15 did you have discussions with anyone regarding its  
16 content?

17 A. Specific to this 302? No.

18 Q. Now, you said just a minute ago that you  
19 don't think Mr. Castellano was present during the  
20 January 22 interview of Lupe Urquizo.

21 A. Correct.

22 Q. But you don't know, because you weren't  
23 there.

24 A. Correct.

25 Q. But I'm going to ask you to take a look at



1 Exhibit T, which is one of the documents you relied  
2 on to prepare the 302, and specifically ask you to  
3 look at the second line of the first paragraph.

4 A. I see it.

5 Q. Does that -- do Agent Sainato's notes  
6 reflect that both Matthew Beck and Randy Castellano  
7 were present during the interview?

8 A. It does.

9 Q. With respect to Trial Exhibit S, how long  
10 is that?

11 A. Four paragraphs.

12 Q. About two-thirds of a page?

13 A. About.

14 Q. And how long is Trial Exhibit T, Agent  
15 Sainato's notes?

16 A. Four pages.

17 Q. Four typewritten pages?

18 A. Yes.

19 Q. And are those typewritten pages  
20 single-spaced or double-spaced?

21 A. The paragraphs are single-spaced. There  
22 are double spaces between paragraphs and some other  
23 notes.

24 Q. Would you agree with me that Agent  
25 Sainato's notes are more detailed, significantly

1 more detailed than the 302 you prepared?

2 A. Yes.

3 Q. Do you know how long the interview lasted  
4 with Lupe Urquizo on January 22, 2018?

5 A. I don't know.

6 Q. Now, looking at Trial Exhibit S, the 302,  
7 who is listed as the author of the 302?

8 A. I am.

9 Q. And is Trial Exhibit S, the 302, the first  
10 draft of the 302 that you prepared that was supposed  
11 to document the January 22 statements of Urquizo?

12 A. We don't have drafts. They're either  
13 finalized or not.

14 Q. Well, let me ask it this way, then. When  
15 you prepared the 302 on January 28, did you type it?

16 A. Yes.

17 Q. And prior to it being finalized, did you  
18 show it to anybody?

19 A. I don't think I did.

20 Q. You said you don't think. Is there some  
21 doubt?

22 A. Sometimes there's cases where I show my  
23 work to others. I don't believe I did that in this  
24 specific instance.

25 Q. You don't believe you did it in this

1 specific case?

2 A. Right.

3 Q. Did you discuss the content of the 302  
4 with anybody prior to it being finalized?

5 A. I don't think so.

6 Q. Is there anything that -- I don't know  
7 what you might have or what might help refresh your  
8 memory so you could be more certain. Is there  
9 anything?

10 A. No.

11 Q. Is the 302 that is Trial Exhibit S -- let  
12 me ask it this way. How is the 302 that is Trial  
13 Exhibit S -- how does that compare to what you  
14 originally typed up on January 28?

15 A. The 302 is what I typed up on January 28.

16 Q. So it's identical?

17 A. Yes.

18 Q. Now, in the 302, Trial Exhibit S, did you  
19 list yourself as somebody that participated in the  
20 interview of Lupe Urquizo on January 22?

21 A. I did not.

22 Q. And why not?

23 A. I wasn't there.

24 Q. Did you list Agent Sainato as somebody  
25 that participated in that interview with Lupe

1 Urquizo on January 22?

2 A. No, I didn't.

3 Q. And why not?

4 A. I'm not sure. Mistake, probably.

5 Q. How did you refer to the FBI agents who  
6 participated in the interview with Lupe Urquizo on  
7 January 22 in that 302, Exhibit S?

8 A. I don't think I did. I just said "FBI  
9 personnel."

10 Q. So you referred to the people  
11 participating in that interview from the FBI as FBI  
12 personnel?

13 A. Yes.

14 Q. And didn't list the name or names?

15 A. Right.

16 Q. And is that how the FBI participants in  
17 the other interviews of Lupe Urquizo were documented  
18 in FBI 302s?

19 A. No.

20 Q. I'm sorry?

21 A. No.

22 Q. No?

23 A. No.

24 Q. In the other 302s, Exhibits D, E, and F,  
25 they're referenced specifically by name; correct?

1 A. Correct.

2 Q. Is it consistent with accepted FBI  
3 policies and procedures to prepare a 302 report of  
4 an investigation that you personally had nothing to  
5 do with?

6 A. I don't know.

7 Q. What do you think?

8 A. Probably not.

9 Q. Right. What's the purpose of the 302?

10 A. To report what happened or what was said.

11 Q. And if you're not in the room to hear what  
12 was said, how can you reliably report on it?

13 A. I agree. In this instance, which was  
14 unusual, as you've said, Agent Sainato left, and in  
15 order to get discovery to the defense in a timely  
16 manner, we did something unusual.

17 Q. In fact, it's contrary to accepted FBI  
18 practices and procedures to prepare a 302 of an  
19 interview that you did not participate in; right?

20 A. I don't know for sure.

21 Q. Well, did you get trained in how to be a  
22 special agent?

23 A. Yes.

24 Q. Okay. And did any of that training have  
25 to do with preparation of 302 reports, official

1 reports of FBI investigations?

2 A. Yes.

3 Q. And did any part of that training discuss  
4 how to prepare a report of an investigation that you  
5 didn't do?

6 A. I don't think so.

7 Q. Whose idea was it to reference the FBI  
8 agent that participated in the January 22 interview  
9 of Urquizo by the term "FBI personnel"?

10 A. I don't know for sure. I assume that was  
11 me, since I wrote it.

12 Q. Who else's idea could it possibly have  
13 been?

14 A. Just mine.

15 Q. Did you reference -- let me just ask you  
16 first, who does "FBI personnel" reference?

17 A. In this case?

18 Q. Yes.

19 A. Sainato.

20 Q. Agent Sainato?

21 A. Yes.

22 Q. And only Agent Sainato; right?

23 A. I can't say that there weren't other  
24 personnel from the FBI in that room at one point in  
25 time.

1 Q. But according to Agent Sainato's notes, he  
2 was the only FBI agent present during that  
3 interview; right?

4 A. At the beginning. I don't know if anybody  
5 came in later.

6 Q. Did you discuss using the term "FBI  
7 personnel" in that 302, Exhibit S, with anybody  
8 else?

9 A. No.

10 Q. And did you refer to Agent Sainato in that  
11 302 as FBI personnel to obscure the fact that you  
12 were writing a report, a 302 of an interview that  
13 you didn't participate in?

14 A. No.

15 Q. Why did you do it?

16 A. It was a mistake.

17 Q. It's a mistake, obviously, now, when you  
18 look back at it; right?

19 A. Yes.

20 Q. But why did you do it at the time?

21 A. I don't think I had any nefarious reasons.  
22 I just -- it could have been part of a pony that we  
23 had --

24 Q. I'm sorry?

25 A. -- forgot to change it.

1 Q. I didn't hear the full answer.

2 A. The beginning of the 302 could have been  
3 part of a pony or a template that we had and I  
4 neglected to change it or forgot to change it.

5 Q. Prior to preparing Trial Exhibit S, had  
6 you ever written a 302 before referencing the  
7 federal agents present as, quote, "FBI personnel"?

8 A. I don't know.

9 Q. In your 302, Trial Exhibit S, did you list  
10 the U.S. Attorneys that were present during the  
11 interview of Lupe Urquizo on January 22?

12 A. I listed AUSA Matthew Beck.

13 Q. And I think we spoke about this earlier.  
14 You did not list AUSA Randy Castellano?

15 A. Correct.

16 Q. And do you know from personal knowledge  
17 whether Mr. Beck was present during the interview?

18 A. No.

19 Q. Okay. You know based on Agent Sainato's  
20 notes?

21 A. Correct.

22 Q. And do you know from personal knowledge  
23 whether AUSA Castellano was present?

24 A. No.

25 Q. But you know from Agent Sainato's notes



1 that the notes say he was there?

2 A. Correct.

3 Q. Did you have any discussions with anybody,  
4 Agent Sainato or U.S. Attorneys Beck or Castellano,  
5 about who was present during the interview or whose  
6 name to include in the 302?

7 A. I assume that when Agent Sainato called me  
8 to ask that I write this report, that he mentioned  
9 Matt Beck, and that's why I included him.

10 Q. Okay. And he didn't mention Randy  
11 Castellano?

12 A. Not that I remember. He could have.

13 Q. And when you prepared the 302, what was in  
14 your mind with that conversation with Agent Sainato,  
15 when you prepared the 302 of the interview Matt Beck  
16 and I conducted?

17 A. Yes.

18 Q. So even though it was in the notes that  
19 Randy Castellano was there, you left that out of the  
20 302.

21 A. I did.

22 Q. Did you leave Mr. Castellano out of the  
23 302 for some reason, or do you think it was a  
24 mistake?

25 A. I think it was a mistake. I think I was

1 trying to turn this 302 out as quickly as possible  
2 so that it could be turned over to defense.

3 Q. So you were under some sort of time  
4 pressure?

5 A. Yes.

6 Q. And because of that time pressure, you  
7 didn't review Agent Sainato's notes, Exhibit T, as  
8 carefully as you might have otherwise?

9 A. I think I reviewed the content. I may  
10 have neglected to include with more specificity as  
11 to who was there.

12 Q. You've told us today that Trial Exhibit T  
13 are Sainato's notes and that you had nothing to do  
14 with preparing those notes; right?

15 A. Correct.

16 Q. Have you ever held those notes out or  
17 represented to anybody that the notes in Trial  
18 Exhibit T were your notes?

19 A. No.

20 Q. And you told us that you think, to the  
21 best of your recollection, you got those notes from  
22 Agent Sainato as an email attachment?

23 A. I believe so.

24 Q. And do you know what format the file was  
25 in? For example, was it a Word document, or was it

1 a PDF file, or something else?

2 A. I don't remember.

3 Q. Do you remember what the attachment or the  
4 file was named that Agent Sainato sent you?

5 A. I don't.

6 Q. That's something, though, that you could  
7 potentially find out if you found that email. And  
8 I'm assuming that email would have been sent to you  
9 by Agent Sainato on or shortly before January 28,  
10 2016?

11 A. Yes.

12 Q. And I think we've established -- I just  
13 want to take this sort of methodically. But I think  
14 we have established you're not sure how the notes  
15 ultimately got to the Government prosecutors,  
16 whether they came from you or Agent Sainato or  
17 somebody else?

18 A. Correct.

19 Q. And do you know what format the notes,  
20 Trial Exhibit T, were handed over to Government  
21 prosecutors? In other words, as a Word document, or  
22 as a PDF, or something else?

23 A. I don't know.

24 Q. Do you have any idea what the file itself  
25 was named?

1 A. No.

2 Q. The electronic file that contained the  
3 content of Trial Exhibit T?

4 A. I don't know.

5 Q. Okay.

6 MS. JACKS: Your Honor, I have a  
7 screenshot that I took of my computer depicting  
8 items that were turned over by the Government,  
9 depicting some of the items that were turned over by  
10 the Government on March 2, 2018, in the evening  
11 hours. Can I mark that next in order? I think that  
12 would be G.

13 THE COURT: Yeah, I don't have any problem  
14 with that. Your motion was filed on March 1st,  
15 so...

16 MS. JACKS: Then it would be -- excuse me.  
17 Yeah. Let me just -- this would have been February  
18 28, I think, at 7:00 p.m., and I think -- the time  
19 of that disclosure I think is referenced in my  
20 original motion.

21 THE COURT: Okay. Any objection,  
22 Mr. Castellano?

23 Are you moving this admission?

24 MS. JACKS: Let me show him a copy.

25 THE COURT: All right.

1 MR. CASTELLANO: While she's showing me  
2 the copy, I may have attached -- actually, I do have  
3 an attachment to the Government's response to the  
4 motion for a new trial, all of the discovery  
5 letters, so there may be some overlapping.

6 THE COURT: Is that your response to 2408?  
7 That's your 1850, isn't it?

8 MR. CASTELLANO: Actually, my response to  
9 2408 I think is 2442, and the discovery letters are  
10 attached.

11 THE COURT: Okay. Should we just be  
12 taking your 2408 at the same time here, or is there  
13 a reason to separate those out?

14 MS. JACKS: I don't think so. I think my  
15 block of time included this and our new trial Rule  
16 29.

17 THE COURT: So we'll just upgrade this.  
18 This includes 2408. So we'll just take this all  
19 together.

20 BY MS. JACKS:

21 Q. Agent Stemo, I want to ask you to take a  
22 look at Trial Exhibit T, Agent Sainato's notes, and  
23 can you tell me what the Bates numbers on those  
24 notes are?

25 A. U.S. v. DeLeon, et al., 54285 to 54288.

1 MS. JACKS: Okay. And may Exhibit G be  
2 admitted? This is a screenshot of part of the  
3 discovery that was turned over on February 28.

4 THE COURT: Any objection, Mr. Castellano?

5 MR. CASTELLANO: Your Honor, I think she  
6 can lay a better foundation or write something on  
7 the exhibit so we know what it is. When we look at  
8 the records it's going to be an extract of a page.

9 THE COURT: I don't know if she can help,  
10 as far as any foundation.

11 MS. JACKS: I'm just going to ask her to  
12 identify the actual file that was disclosed to us  
13 electronically.

14 THE COURT: Okay. Go ahead and see if you  
15 can satisfy Mr. Castellano.

16 MS. JACKS: Do you mind if I approach and  
17 show her the exhibit?

18 THE COURT: Go ahead.

19 MS. JACKS: Thank you.

20 MR. CASTELLANO: Sorry, Your Honor, what  
21 was the date again of that exhibit?

22 MS. JACKS: The screenshot was February  
23 28. And it's a partial. It captures a part -- a  
24 listing of part of the documents that were disclosed  
25 that evening by the Government.

1 BY MS. JACKS:

2 Q. Do you recognize that list of documents,  
3 Agent Stemo, to some extent?

4 A. Yes.

5 Q. And is there an entry or a document that  
6 purports to be Bates pages 54285 to 54288?

7 A. Yes.

8 Q. And can you tell us the name of that  
9 electronic document that was disclosed by the  
10 Government?

11 A. Yes. "Agent Stemo's notes, re-interview  
12 of Lupe Urquizo on 1/22/18."

13 Q. Did you do anything to rename an  
14 electronic file that was produced by Agent Sainato  
15 to reflect that it was your notes of the January 22  
16 interview of Lupe Urquizo?

17 A. No.

18 Q. Would you agree with me that that file  
19 misrepresents what the content actually was?

20 A. Yes.

21 Q. And how does it misrepresent the content?

22 A. Those aren't my notes.

23 Q. They're Agent Sainato's notes?

24 A. Correct.

25 Q. Okay.

1 MR. CASTELLANO: Your Honor, for the  
2 record, Document 2451-11 is the email from the  
3 Government to the paralegal.

4 THE COURT: All right. So any objection  
5 to this coming in as an exhibit in this hearing,  
6 Mr. Castellano?

7 MR. CASTELLANO: No, Your Honor, because  
8 I'll also be moving the admission of these  
9 documents.

10 THE COURT: All right. So Defendants'  
11 Exhibit -- or Sanchez Exhibit G will be admitted  
12 into evidence.

13 (Defendant Sanchez Exhibit G admitted.)

14 BY MS. JACKS:

15 Q. Do you know how that electronic file got  
16 the name "Agent Stemo's notes of the Lupe Urquizo  
17 interview"?

18 A. I don't.

19 Q. And you said you had nothing to do with  
20 naming it that?

21 A. Correct.

22 Q. Do you know whose idea it was to name the  
23 file "Agent Stemo's notes"?

24 A. I do not.

25 Q. Do you know when it was named that?



1 A. I do not.

2 Q. When Agent Sainato emailed you the file  
3 containing his notes of the Urquizo interview, was  
4 it named "Agent Stemo's notes"?

5 A. I don't know.

6 Q. Let me just finish the question, because I  
7 want to read it exactly. Was it named "Agent  
8 Stemo's notes re: interview of Lupe Urquizo on  
9 January 22, 2018"?

10 A. I don't think so.

11 Q. Okay. Because that would have been  
12 completely untrue.

13 A. Correct.

14 Q. And Agent Sainato would have had no reason  
15 to name his notes of the interview your notes of the  
16 interview?

17 A. Correct.

18 Q. Have you had any conversations with  
19 anybody about why that file containing Agent  
20 Sainato's notes was renamed to make it appear as if  
21 the notes were yours?

22 A. No.

23 Q. Is it consistent with generally accepted  
24 FBI practices and procedures to rename electronic  
25 files to try to obscure the true author?

1 A. No.

2 Q. In fact, that would be directly contrary  
3 to FBI practices and procedures; correct?

4 A. I assume so.

5 Q. Was the file containing Agent Sainato's  
6 notes of the January 22 Urquizo interview renamed to  
7 obscure the fact that you weren't there?

8 A. I don't think so.

9 Q. Was it renamed to make it appear that the  
10 person who prepared the 302, the official report of  
11 the investigation, was actually present during the  
12 interview?

13 A. I don't think so.

14 Q. Do you know why the file was renamed?

15 A. I assume it was a miscommunication.  
16 Someone saw that I wrote a 302 and assumed those  
17 were my notes.

18 Q. And certainly the content of the 302,  
19 referring to the FBI agent participating in the  
20 interview as "FBI personnel," could contribute to  
21 someone making that faulty conclusion.

22 A. Yes.

23 Q. And when you chose to use the term "FBI  
24 personnel" in the 302, did you use that term so that  
25 somebody making some sort of conclusion about who

1 was there could conclude that you were there?

2 A. I don't think so.

3 Q. Now, I want to talk to you about  
4 information that's in Agent Sainato's notes, Exhibit  
5 T, Trial Exhibit T, and ask you about whether that  
6 information appeared in the official report of that  
7 interview, Trial Exhibit S, that you prepared. So  
8 if you need to reference any of those documents,  
9 just let me know and I'll give you time to look.

10 According to Agent Sainato's notes, on  
11 January 22, 2018, did Lupe Urquizo tell Agent  
12 Sainato and the U.S. Attorneys that were present  
13 that Mario Rodriguez instructed Urquizo to bring the  
14 paperwork to Southern New Mexico Correctional  
15 Facility by having Urquizo's brother give him the  
16 message?

17 A. Yes.

18 Q. Is that information contained in Trial  
19 Exhibit S, the 302 that you prepared?

20 A. No.

21 Q. Who decided to leave that information out  
22 of the official report of investigation?

23 A. I did.

24 Q. And did you decide on your own, or did you  
25 get advice from somebody else or some other people?

1 A. On my own.

2 Q. Do Agent Sainato's notes, Trial Exhibit T,  
3 indicate that on January 22, Lupe Urquizo told Agent  
4 Sainato and other people present during that  
5 interview that when Urquizo got to Southern New  
6 Mexico Correctional Facility, there was no property  
7 officer on duty and he couldn't immediately get his  
8 property?

9 A. Something to that effect, yes.

10 Q. And does that information appear in the  
11 official report of investigation, the 302, Exhibit  
12 S?

13 A. No, it doesn't.

14 Q. And who decided to omit that information  
15 from the 302, Exhibit S?

16 A. I did.

17 Q. And did you do that on your own, or did  
18 anybody else participate in that decision with you?

19 A. On my own.

20 Q. Do Agent Sainato's notes, Trial Exhibit T,  
21 reflect that on January 22, 2018, Lupe Urquizo said  
22 that Mario Rodriguez passed a note under the door  
23 asking if Urquizo had the Molina paperwork?

24 A. Yes.

25 Q. And is that information contained in the

1 official report of investigation that you prepared,  
2 Exhibit S?

3 A. No.

4 Q. Who decided to omit that information from  
5 the 302?

6 A. I did.

7 Q. And did you do that on your own, or did  
8 you have discussions about that with anybody else?

9 A. On my own.

10 Q. Do Agent Sainato's notes, Trial Exhibit T,  
11 reflect that on January 22, 2018, Lupe Urquizo told  
12 him that Rodriguez, Mario Rodriguez, said that  
13 Montoya, Jerry Montoya, Jerry Armenta, and Timothy  
14 Martinez were going to be tasked with killing  
15 Molina?

16 A. Yes.

17 Q. And is that information contained in the  
18 302 that you prepared, Exhibit S?

19 A. No.

20 Q. And who decided to omit that information?

21 A. I did.

22 Q. And did you do that on your own?

23 A. I did.

24 Q. Do Agent Sainato's notes of the January  
25 22, 2018, interview of Lupe Urquizo reflect the fact

1 that on that date, Urquizo said that Daniel Sanchez  
2 was assigned to cover the cameras?

3 A. Yes.

4 Q. And is that information reflected in  
5 Exhibit S, the 302 you prepared?

6 A. No.

7 Q. Who decided to omit that information from  
8 the 302?

9 A. I did.

10 Q. And did you make that decision on your own  
11 or with advice from somebody else?

12 A. On my own.

13 Q. And finally, do Agent Sainato's notes,  
14 Exhibit T, reflect that on January 22, 2018, after  
15 the Molina murder, that Lupe Urquizo, Mario  
16 Rodriguez, David Calbert, Robert Martinez, and Roy  
17 Martinez discussed killing Daniel Sanchez because,  
18 quote, "he did not participate in the Molina  
19 homicide or even cover the camera like he was  
20 supposed to"?

21 A. Yes.

22 Q. And is that information reflected in the  
23 official report of the interview that you prepared,  
24 Exhibit S?

25 A. It is not.

1 Q. And who decided to omit that information  
2 from the 302?

3 A. I did.

4 Q. And did you do that in consultation with  
5 anyone else?

6 A. On my own.

7 Q. I just have a few more questions, and it's  
8 regarding the release of the notes that are Exhibit  
9 T. Do you know who made the decision to release  
10 Exhibit T, the notes of the January 22 Urquizo  
11 interview, to the defendants in this case?

12 A. I don't know.

13 Q. Do you know when that decision was made?

14 A. I don't.

15 Q. If the notes were released on the evening  
16 of February 28, 2018, do you know how -- how much  
17 prior to that there were discussions about releasing  
18 those notes?

19 A. I believe it was like a day or two, we  
20 were ordered to produce them during the day. And  
21 after court ended, we went and tried to find  
22 everything.

23 Q. So your recollection is: The Judge  
24 ordered the notes produced, and then you scrambled  
25 around, got them together, and you released them

1 that night?

2 A. I'm not sure if it was that night, but it  
3 was a short timeframe.

4 Q. Were you privy to any discussions  
5 concerning whether to release the notes?

6 A. No.

7 Q. Were you privy to any discussions about  
8 the timing of releasing those notes?

9 A. No.

10 MS. JACKS: I have nothing further at this  
11 time.

12 THE COURT: Thank you, Ms. Jacks.

13 Did anybody join back on March 1st? My  
14 memory is that everybody joined that motion, but I  
15 just don't remember. I don't have a joinder, a  
16 formal joinder, but I think we were moving rather  
17 quickly, and my memory is in the courtroom,  
18 everybody jumped up and said they joined Ms. Jacks'  
19 March 1st motion.

20 Does anybody want to speak on that issue?

21 MS. BHALLA: On the joinder issue, Your  
22 Honor?

23 THE COURT: Well, I just don't remember if  
24 there was a formal joinder. But I remember there  
25 being -- my memory is it was an oral joinder with



1 her motion at the time.

2 MS. BHALLA: My memory is that Mr. Herrera  
3 did orally join that motion, Your Honor.

4 THE COURT: Does anybody have  
5 cross-examination of Ms. Stemo on either this motion  
6 or Ms. Jacks' 2408? Mr. Lowry?

7 MR. LOWRY: No, Your Honor, and I'll just  
8 second Ms. Bhalla's.

9 THE COURT: That's my memory, everybody  
10 jumped up and joined that.

11 All right, Mr. Castellano. Do you have  
12 cross-examination of Ms. Stemo?

13 MR. CASTELLANO: Yes, Your Honor.

14 THE COURT: Mr. Castellano.

15 CROSS-EXAMINATION

16 BY MR. CASTELLANO:

17 Q. Agent Stemo, you testified earlier that  
18 it's not common for one agent to prepare a report  
19 from another agent's notes; is that correct?

20 A. Correct.

21 Q. What was different about this situation?

22 A. Agent Sainato had left New Mexico and did  
23 not have access to our systems to produce a report  
24 on his own.

25 Q. And what was the importance of getting

1 this information out to the defendant?

2 A. Getting it to them in a timely manner,  
3 because we were about to start trial or were in  
4 trial.

5 Q. Do you recall that trial began on January  
6 29 of 2018?

7 A. Yes.

8 Q. And looking at Exhibit S, it appears that  
9 the date drafted was January 28, 2018; is that  
10 correct?

11 A. Yes.

12 Q. And looking at the upper right-hand corner  
13 where it says "Date of entry" on that report, what  
14 does it indicate?

15 A. January 29, 2018.

16 Q. What does it mean that there's a  
17 difference between those two dates?

18 A. The date drafted is the date that the  
19 report is entered and submitted. The date of entry  
20 is the date the report is approved and ready for  
21 dissemination.

22 Q. So then is it fair to say that you  
23 potentially drafted this on the 28th and had it  
24 approved the next day, the 29th?

25 A. Yes.

1 Q. At that point, would you then have sent it  
2 to the United States Attorney's Office for  
3 disclosure?

4 A. Yes.

5 Q. You were asked about the phrase "FBI  
6 personnel" being present for the interview. You  
7 mentioned -- I think you called it a pony?

8 A. Yes.

9 Q. Is it also known as a go-by?

10 A. Yes.

11 Q. So was there an indication that there were  
12 other reports which started out with an introductory  
13 statement that FBI personnel were present rather  
14 than specific names?

15 A. Yes.

16 Q. And you mentioned when you prepared the  
17 report which is Exhibit S, the January 22, 2018,  
18 interview of Lupe Urquizo, that you reviewed other  
19 reports in preparation for that report; is that  
20 correct?

21 A. Yes.

22 Q. And why is it that after comparing the  
23 notes and the other 302s from -- and the other 302s,  
24 that we have three paragraphs in your report, which  
25 is Exhibit S?

1           A.     The three paragraphs included new or  
2 potentially contradictory information provided by  
3 Lupe Urquizo on that date.

4           Q.     Is that the conclusion you drew from  
5 looking at the notes and comparing that to the other  
6 302s which were statements by Lupe Urquizo?

7           A.     Yes.

8           Q.     And so was the purpose of your report,  
9 Exhibit S, to --

10           MS. JACKS:   Objection, leading.

11           THE COURT:   Yeah.   Don't lead.   I'll get  
12 more information on this from Ms. Stemo if you don't  
13 lead her.

14           BY MR. CASTELLANO:

15           Q.     So in other words, why are there just  
16 three paragraphs there, as opposed to four pages  
17 from Agent Sainato's notes?

18           A.     The purpose of our pretrial interviews and  
19 subsequent reports was to provide any new  
20 information to defense counsel that wasn't  
21 previously provided.   I don't think we wanted to  
22 inundate them with information they already had, and  
23 therefore, we chose to only provide them new  
24 information.

25           Q.     What were you aware of in terms of a

1 conspiracy to murder Daniel Sanchez following the  
2 Molina murder?

3 A. There was talk amongst SNM that they  
4 wanted to hit him.

5 MS. JACKS: Objection, this is hearsay.

6 THE COURT: Well, you know, we can sort  
7 this out in any findings of fact and conclusions,  
8 but I may need to hear it post trial. Overruled.

9 BY MR. CASTELLANO:

10 Q. Please continue.

11 A. The SNM talked about hitting Daniel  
12 Sanchez because he failed to cover the cameras and  
13 retrieve the shank from Jerry Armenta, like he was  
14 supposed to after the hit occurred.

15 Q. So when you look at Agent Sainato's notes  
16 and there is an indication in there that people had  
17 agreed to murder Daniel Sanchez for failure to do  
18 what he agreed to do --

19 A. Correct.

20 Q. -- based on your information, was that new  
21 information?

22 A. No.

23 Q. So do you recall from the March 6, 2017,  
24 what it said about the 2017 report, which is Exhibit  
25 E -- do you recall if there is a discussion in that

1 report that there was a green light placed on Daniel  
2 Sanchez? And I'll refer you to page 4 of 7. If it  
3 has a Bates stamp, it's 43641 at the bottom.

4 A. Yes.

5 Q. And so the fact that there was a  
6 conspiracy to murder Daniel Sanchez that was in the  
7 January 22 notes, was that new information to you?

8 A. No, it wasn't.

9 Q. Is that why that was omitted from your  
10 report?

11 A. Correct.

12 Q. And you talked about believing that this  
13 information was directed towards Mr. Beck when it  
14 came to your discussions with Agent Sainato?

15 A. Yes.

16 Q. Were you aware that Lupe Urquizo was Matt  
17 Beck's witness for trial?

18 A. I don't remember, but it's likely.

19 Q. And so if that was his witness for trial,  
20 would it make sense that this information would be  
21 directed towards him?

22 A. Yes.

23 Q. You talked earlier about not specifically  
24 your 302, which is Exhibit S, but that generally  
25 there is a discussion about pretrial interviews. Do

1 you remember that?

2 A. Yes.

3 Q. And so what was the purpose of documenting  
4 information that came out of the pretrial  
5 interviews?

6 A. The purpose was to document anything that  
7 was new or potentially contradictory that would be  
8 useful to the defense during trial that they didn't  
9 already have.

10 Q. And when you prepared the report, which  
11 was Exhibit S, is that what you had in mind when you  
12 prepared that report?

13 A. Yes.

14 MR. CASTELLANO: May I have a moment, Your  
15 Honor?

16 THE COURT: You may.

17 MR. CASTELLANO: Thank you, Your Honor. I  
18 have no further questions.

19 THE COURT: Thank you, Mr. Castellano.

20 Do any other defendants have questions of  
21 Ms. Stemo before Ms. Jacks?

22 MS. JACKS: I have a few.

23 THE COURT: All right, Ms. Jacks. Do you  
24 have redirect of Ms. Stemo?

25

1 REDIRECT EXAMINATION

2 BY MS. JACKS:

3 Q. Agent Stemo, do you know how many pages of  
4 materials were turned over to the defendants in this  
5 case between January 29 and March 1, 2018?

6 A. I do not.

7 Q. Would you be surprised if I told you it  
8 was 6,282 pages of materials?

9 A. No.

10 Q. That's not surprising? Sounds about  
11 right?

12 A. I don't know about the number, but it  
13 wouldn't surprise me.

14 Q. Would you agree that that is inundating  
15 the defense with information in the middle of trial?

16 A. No.

17 Q. If you were so concerned about not  
18 inundating the defense with information, do you know  
19 why, during trial, the defense was provided 6,282  
20 pages of discovery?

21 A. I believe there were several reasons.

22 Q. Okay. I want to ask you -- I want to just  
23 follow up with you about some of your answers to  
24 Mr. Castellano's questions. You said that in  
25 preparing the 302, you wanted to include new



1 information?

2 A. Yes.

3 Q. And you wanted to include potentially  
4 contradictory information?

5 A. Yes.

6 Q. I think you've agreed with me that Agent  
7 Sainato's notes, Exhibit T, reflect that during that  
8 January 22, 2018, interview, Lupe Urquizo told the  
9 investigators, Agent Sainato and whoever else was in  
10 the room, that Daniel Sanchez did not participate in  
11 the Molina homicide.

12 A. That's not entirely accurate.

13 Q. Well, that's part of what he said. Would  
14 you agree with me?

15 A. Yes, the cameras and the shank part.

16 Q. Well, those notes don't say anything about  
17 the shank, do they?

18 A. Correct.

19 Q. What Agent Sainato's notes say -- and I'm  
20 going to read it specifically about that -- is that  
21 Lupe Urquizo and others talked about hitting Daniel  
22 Sanchez, quote, "because he did not participate in  
23 the Molina homicide or even cover the camera like he  
24 was supposed to."

25 A. Correct.

1 Q. Prior to January 22, 2018, had Lupe  
2 Urquizo ever told investigators or complained that  
3 Daniel Sanchez did not participate in the Molina  
4 homicide?

5 A. Not in those words exactly. I believe he  
6 also mentioned the cameras and the shank before, so  
7 yes.

8 Q. Okay. I mean, yeah, he did mention the  
9 camera and the shank. That's documented in the  
10 report before you; right? Would you agree with me  
11 that no report prior to January 22, 2018, reflects  
12 Lupe Urquizo saying, "Daniel Sanchez did not  
13 participate in the Molina homicide"?

14 A. May I have a moment?

15 Q. Of course.

16 A. He had said that before.

17 Q. And would you direct me to the report in  
18 which you think that's reflected?

19 A. Exhibit E. Bates stamp 43641, bottom  
20 paragraph. "Urquizo said that the SNM called a  
21 green light on Daniel Sanchez after the Molina hit  
22 because he failed to cover the camera and did not  
23 retrieve Armenta's shank after the hit."

24 Q. Is there anything in that sentence about  
25 Lupe Urquizo saying Daniel Sanchez did not

1 participate in the Molina homicide?

2 A. Not in those exact words.

3 Q. And would you agree with me that the  
4 statement reflected in Agent Sainato's notes from  
5 January 22 said that there was a discussion about  
6 killing Daniel Sanchez because he didn't participate  
7 in the homicide and he didn't cover the camera like  
8 he was supposed to?

9 A. Yes, that's in there.

10 Q. Is that statement inconsistent, at least  
11 in part, with the statement that you just read me?

12 A. I feel like this is a matter of semantics.

13 Q. I think if you were Mr. Sanchez, you  
14 wouldn't feel like it was a matter of semantics.

15 A. Partly.

16 Q. Try to look at it objectively.

17 A. I am.

18 Q. Is there information contained in the  
19 January 22 notes about Mr. Sanchez not participating  
20 in the homicide that is not contained in any other  
21 302?

22 A. Right. The way it is written, yes.

23 Q. Okay. And would you also agree with me  
24 that it is at least potentially inconsistent with  
25 prior statements of Urquizo saying they wanted to

1 kill Sanchez because he didn't cover the camera and  
2 he didn't dispose of Armenta's shank?

3 A. Somewhat.

4 Q. Somewhat inconsistent.

5 A. Yes.

6 Q. And I think you told us that it was the  
7 Government's theory of the case that Mr. Sanchez was  
8 the leader and assigned the roles to be -- to the  
9 various individuals that physically committed the  
10 Molina homicide.

11 A. He was involved in the planning and  
12 assigning of the roles, yes.

13 Q. That was the Government's theory.

14 A. Yes.

15 Q. And would you -- in regard to at least  
16 Agent Sainato's notes of the January 22, 2018,  
17 interview, did Urquizo complain that Sanchez didn't  
18 do the job he was assigned?

19 A. "He" being Sanchez?

20 Q. Yes.

21 A. Yes.

22 Q. And would you agree with me that that's at  
23 least potentially inconsistent with Sanchez  
24 assigning jobs?

25 A. Not necessarily.

1 Q. I said "potentially."

2 A. Then, yes.

3 Q. So in preparing the 302, Exhibit S, of  
4 that January 22 interview, you left out information  
5 that was not contained in other 302s and that was  
6 potentially inconsistent with other information that  
7 had been provided by Urquizo?

8 A. In my reading of the previous reports and  
9 in comparing that with Agent Sainato's notes, I did  
10 not read it that way.

11 Q. But today you've acknowledged at least  
12 that --

13 A. It's possible, yes.

14 Q. And if, as you've testified, there was a  
15 rush to get the material to the defense about the  
16 pretrial interviews of witnesses, do you know why  
17 the notes of those interviews, in particular Agent  
18 Sainato's notes, which were almost a transcription  
19 of the interview -- why those weren't provided to  
20 the defense prior to the beginning of trial?

21 A. I don't know.

22 MS. JACKS: I have nothing further.

23 THE COURT: Thank you, Ms. Jacks.

24 Do you have anything further,

25 Mr. Castellano?

1 MR. CASTELLANO: I do, Your Honor; a few  
2 follow-up questions, if I may.

3 THE COURT: All right, Mr. Castellano.

4 RECROSS-EXAMINATION

5 BY MR. CASTELLANO:

6 Q. Agent Stemo, going back to Agent Sainato's  
7 notes, which is Exhibit T, does it indicate in the  
8 introductory paragraph that Agent Sainato is the  
9 author or present for that interview?

10 A. It does.

11 Q. And so when you open up that attachment,  
12 is it clear that Agent Sainato is the author?

13 A. Yes.

14 THE COURT: Mr. Castellano, let's talk a  
15 little bit about scheduling. Do y'all want to take  
16 a 15-minute break, take a late lunch, about 1:30, or  
17 do you want to go ahead and take a lunch break now?  
18 I need to give Ms. Bean some break here. What do  
19 you think?

20 MR. CASTELLANO: I'm happy to take a break  
21 now and a late lunch, but I'm happy --

22 THE COURT: Does that work for the  
23 defendants? I know y'all are sack lunching today,  
24 and tomorrow is the big meal; right? That's the way  
25 it's working? Do I even know what I'm talking

1 about? I'm seeing some affirmative. Is it chicken  
2 or burgers? What are y'all getting?

3 MR. CASTLE: They were wanting one of  
4 those steaks you were talking about during trial,  
5 Judge.

6 THE COURT: I'm eating turkey. If there  
7 is no objection, then, why don't we take a 15-minute  
8 break and come back in and do a late lunch. Is that  
9 all right with you, Mr. Cooper?

10 MR. COOPER: I know that Mr. Castle was  
11 going to get out of here, and I'd just as soon go to  
12 lunch now, but I don't know what everybody else --

13 MS. JACKS: We do have the issue about the  
14 emails that Agent Sainato -- I'm sorry, that Agent  
15 Stemo may be able to check over the lunch hour. I  
16 don't know that we can finish totally unless she has  
17 a chance to do that.

18 THE COURT: All right. Well, let's take  
19 our lunch break now, and then we'll come back in and  
20 start at quarter of 1:00, ten to 1:00, something  
21 like that. Mr. Benjamin?

22 MR. BENJAMIN: Yes, Your Honor. Assuming  
23 we start at ten to 1:00, we'll take our normal  
24 break, then, an hour and a half from there? I'm  
25 trying to schedule a call this afternoon.

1 THE COURT: Yeah, that's probably about  
2 right.

3 (The Court stood in recess).

4 THE COURT: All right. Let's go on the  
5 record. I think we've got all the defendants and an  
6 attorney for each one of the defendants.

7 Ms. Stemo, I'll remind you that you're  
8 still under oath.

9 Mr. Castellano, if you wish to continue  
10 your cross-examination of Ms. Stemo, you may do so  
11 at this time.

12 MR. CASTELLANO: Thank you, Your Honor.

13 THE COURT: Mr. Castellano.

14 MR. CASTELLANO: I don't believe Ms. Jacks  
15 has any objection. I'm going to move the admission  
16 of Government's Exhibits 12 and 13. And if I can  
17 have the Elmo, I'll show them to the Court.

18 THE COURT: Do those numbers relate to  
19 this hearing or --

20 MR. CASTELLANO: They do, Your Honor. I'm  
21 going to show you the document. So it will be  
22 document 2451-12 and 2451-13.

23 THE COURT: It's very blurry on the  
24 screen, so you'll need to probably focus it some.

25 MR. CASTELLANO: So these were attachments



1 from the Government's pleadings, Your Honor, and I'm  
2 showing the Court Government's Exhibit 12, which was  
3 Defendant's Exhibit FL.

4 THE COURT: All right. Any objection,  
5 Ms. Jacks?

6 MS. JACKS: No, Your Honor.

7 THE COURT: All right. Anybody else? Not  
8 hearing any objection Government's Exhibits 12 and  
9 13 will be admitted into evidence for purposes of  
10 this hearing.

11 (Government Exhibits 12 and 13 admitted.)

12 MR. CASTELLANO: Thank you, Your Honor.

13 BY MR. CASTELLANO:

14 Q. Agent Stemo, I'm going to show you what's  
15 been marked for purposes of this hearing as  
16 Government's Exhibit 3. Do you see the designation  
17 at the bottom?

18 A. I do.

19 Q. And this is also Defendants' Trial Exhibit  
20 FV. Do you recognize this document?

21 A. Yes.

22 Q. How do you recognize it?

23 A. It was shown to me a few minutes ago.

24 Q. And do you recognize it as something you  
25 saw also before this hearing?

1 A. Yes.

2 Q. What is it?

3 A. It's a handwritten letter or a copy of one  
4 written by Mario Rodriguez.

5 Q. Is this the document that showed up at  
6 trial that was one of the documents from Mario  
7 Rodriguez' personal property under Agent Sainato's  
8 desk?

9 A. Yes.

10 Q. And why was this produced to the United  
11 States?

12 A. Because when I went through some of those  
13 documents, I determined that some of the information  
14 in here contradicted what Mr. Rodriguez had told us  
15 before.

16 Q. So you identified that as something that  
17 could be inconsistent with his trial testimony?

18 A. Yes.

19 Q. And as a result, then, did you turn it  
20 over to the United States so it could be disclosed  
21 to the defense?

22 A. Yes.

23 Q. I'm showing you what's been admitted as  
24 Government's Exhibit 12. It's also identified as  
25 Defendant's Exhibit FL. Turning to the fourth page

1 of that document, before today had you ever seen  
2 this document?

3 A. No.

4 Q. And did you have a chance to review it  
5 today for court purposes?

6 A. I did.

7 Q. Do you recognize this as virtually a  
8 verbatim statement from Government's Exhibit 13,  
9 which I just showed you?

10 A. Yes.

11 Q. And at the time you found Government's  
12 Exhibit 13 in Mario Rodriguez' property, were you  
13 aware that Exhibit 12 had already been admitted as a  
14 trial exhibit in the trial?

15 A. No, I wasn't.

16 Q. So not knowing that, did that Exhibit 13  
17 which I'm showing you seem much more significant to  
18 you, not knowing it had been introduced at trial?

19 A. It did.

20 MR. CASTELLANO: Your Honor, I don't have  
21 any further questions. I think Agent Stemo told  
22 Ms. Jacks she looked for the emails over the break,  
23 and I think she can answer some of Ms. Jacks'  
24 questions.

25 THE COURT: All right. Thank you,

1 Mr. Castellano.

2 Ms. Jacks.

3 FURTHER REDIRECT EXAMINATION

4 BY MS. JACKS:

5 Q. Agent Stemo, I'll let you tell us what you  
6 found over lunch about the email questions.

7 A. Okay. I found the email in which Agent  
8 Sainato emailed me his notes. They were entitled  
9 "Urquizo notes" and they were in a Word document.

10 Q. They were entitled "Urquizo notes"?

11 A. Yes.

12 Q. And it was a Word document?

13 A. Yes.

14 Q. Okay. And the date of that email?

15 A. The 28th of January 2018.

16 Q. The 20th?

17 A. 28th.

18 Q. Oh, 28th, okay. All right.

19 A. And the second email was from Agent Tom  
20 Neale that included a batch of interview notes  
21 including the Urquizo notes. That was on February  
22 28, 2018, and the title of most of those documents  
23 were last name of the individual interviewed,  
24 underscore, whoever did those notes. And in that  
25 email, my assumption is that Agent Neale thought

1 because I wrote the 302 that I took the notes. So  
2 the Word document is titled "Urquizo notes  
3 underscore Stemo."

4 Q. And the date of that email was February  
5 28?

6 A. Yes.

7 Q. Thank you for finding that out. The notes  
8 which are Trial Exhibit T -- the notes identify that  
9 they're prepared by Agent Sainato; is that right?

10 A. Correct.

11 Q. Within the body of the document.

12 A. Yes.

13 MS. JACKS: I have nothing further.

14 THE COURT: Thank you, Ms. Jacks.

15 Do any of the other defendants have any  
16 redirect of Ms. Stemo?

17 All right. Ms. Stemo, you may step down.

18 Is there any reason Ms. Stemo cannot be  
19 excused from the proceedings, Mr. Castellano?

20 MR. CASTELLANO: No, Your Honor.

21 THE COURT: Can she be excused, Ms. Jacks?

22 MS. JACKS: As far as I'm concerned, but I  
23 can't speak for anybody else.

24 THE COURT: How about anybody else?

25 Anybody else want to keep her under call or let her

1 go?

2 All right. Not hearing anything, you're  
3 discharged from the proceedings. Thank you, Ms.  
4 Stemo.

5 All right, Ms. Jacks. Do you have further  
6 witnesses or evidence?

7 MS. JACKS: Well, I just have one other  
8 thing that I want to put on the record, is that we  
9 did file a Touhy request asking for the ability to  
10 call Matt Beck and/or Mr. Castellano as part of this  
11 hearing. That, my understanding as of last week,  
12 has been denied. The United States Attorney's  
13 Office has declined to make them available.

14 THE COURT: Okay. Let me ask you this.  
15 Maybe Mr. Castellano and Ms. Armijo don't want to go  
16 along with this. There might be some questions you  
17 have and they might be able to answer them. Do you  
18 want to ask me and then see if I might pose the  
19 questions and see if they'd answer them?

20 MS. JACKS: I think I'll just accept the  
21 state of the record as it is.

22 THE COURT: Fine. All right. Anything  
23 else, Ms. Jacks?

24 MS. JACKS: No.

25 THE COURT: All right. How about from the

1 Government? Mr. Castellano, Ms. Armijo, do you have  
2 any witnesses or evidence you want to present on  
3 Ms. Jacks' and Mr. Sanchez' two motions?

4 MR. CASTELLANO: I do have evidence in the  
5 form of exhibits, Your Honor.

6 THE COURT: All right. The 12 and 13?

7 MR. CASTELLANO: Yes. And I have  
8 additional exhibits that were all attachments to our  
9 response.

10 THE COURT: All right.

11 MR. CASTELLANO: And a few other exhibits,  
12 I believe.

13 THE COURT: All right. Do you want to  
14 introduce those separately, or do you just want the  
15 Court to take notice of those that are attached?

16 MR. CASTELLANO: Yes, let me -- if I may  
17 approach, Your Honor, the podium --

18 THE COURT: You may.

19 MR. CASTELLANO: -- and at least try to  
20 make a record of what they are. But I will  
21 basically ask the Court to take notice of the  
22 attachments, but I'll make a record of what they  
23 are.

24 Okay, Your Honor, for the record, Exhibit  
25 1 to Document 2451 was a transcript from Gerald

1 Archuleta, and these have to do with limiting  
2 instructions.

3 Exhibit 2 is a transcript of Billy  
4 Cordova.

5 Document 3 is Government's Exhibit 215,  
6 Trial Exhibit 215.

7 Exhibit 4 was the transcript of Antonio  
8 Palomares.

9 Exhibit 5 was the transcripts of Roy  
10 Martinez.

11 Exhibits 6 and 7 are also transcripts.

12 Exhibit 8 is a Billy Cordova transcript.

13 Exhibit 9 is the January 22 notes by Agent  
14 Sainato.

15 Exhibit 10 are the March 6, 2017, FBI 302  
16 notes, which was also a debrief of Lupe Urquizo.  
17 That's Exhibit 10.

18 Exhibit 11 is the discovery letters that  
19 were disclosed prior to and during trial. That will  
20 give the Court an idea of what was disclosed during  
21 trial. Those are all listed in the discovery  
22 letters themselves.

23 Exhibits 12 and 13 have already been  
24 admitted.

25 Exhibits 14 and 15 are transcripts of



1 Agent Acee's trial testimony.

2 THE COURT: All right. You're moving 1  
3 through 11 and then 14 and 15, Mr. Castellano?

4 MR. CASTELLANO: Yes, Your Honor. It  
5 should be 1 through 15.

6 THE COURT: Any objection, Ms. Jacks?

7 MS. JACKS: No.

8 THE COURT: Any objection from any of the  
9 other defendants? All right. Mr. Lowry?

10 MR. LOWRY: No, Your Honor.

11 THE COURT: All right. Government's  
12 exhibits for purposes of the hearing on 1841 and  
13 2408, Exhibits 1 through 11 and 14 and 15 will be  
14 admitted into evidence.

15 (Government Exhibits 1 through 11, 14 and  
16 15 admitted.)

17 THE COURT: All right, Mr. Castellano, any  
18 further witnesses or evidence the Government wishes  
19 to present?

20 MR. CASTELLANO: Yes, Your Honor, I have a  
21 couple more exhibits. They were not attachments. I  
22 found them since the filing. I'll show them to  
23 defense counsel, or I can summarize them for the  
24 Court.

25 THE COURT: Why don't you see if there is

1 any objection from Ms. Jacks right beside you?

2 MR. CASTELLANO: What would be Exhibit 16  
3 would be the transcript of the trial testimony of  
4 Timothy Martinez on February 13, 2018. And this  
5 relates to the Rule 29 motion on page 52 of that  
6 exhibit. It discusses or mentions the conversation  
7 that Timothy Martinez had with Mario Rodriguez and  
8 with Daniel Sanchez. And so for the Rule 29  
9 purposes, this is direct evidence by a witness that  
10 Daniel Sanchez was involved with the Molina  
11 homicide. So this exhibit and the next exhibit will  
12 be conversations both before and after the Molina  
13 murder.

14 MS. JACKS: There is no objection.

15 THE COURT: All right. And what did you  
16 mark that as, Mr. Castellano?

17 MR. CASTELLANO: This will be Exhibit 16.

18 THE COURT: 16. Any objection from any  
19 other defendant? Not seeing or hearing any -- you  
20 are moving it; correct?

21 MR. CASTELLANO: I am, Your Honor.

22 THE COURT: All right. Government's  
23 Exhibit 16 will be admitted into evidence.

24 (Government Exhibit 16 admitted.)

25 MR. CASTELLANO: Exhibit 17 is a

1 transcript from Timothy Martinez, also from trial.  
2 It relates to the conversation that Mr. Martinez had  
3 with Mr. Sanchez following the Molina murder. The  
4 first page of this document is from the transcript,  
5 page 81. I will let Ms. Jacks take a look at it.

6 MS. JACKS: I have no objection.

7 THE COURT: Any objection from any other  
8 defendant?

9 And you're moving its admission,  
10 Mr. Castellano?

11 MR. CASTELLANO: I am, Your Honor.

12 THE COURT: Government's Exhibit 18 will  
13 be admitted into evidence for purposes of the  
14 hearing related to 1841 and 2408.

15 MR. CASTELLANO: And that should be 17,  
16 Your Honor.

17 THE COURT: All right. Government's  
18 Exhibit 17.

19 (Government Exhibit 17 admitted.)

20 MR. CASTELLANO: Exhibit 18 is trial  
21 testimony, I believe, from February 12, 2018, by  
22 Jerry Montoya. And I'll show that, as well, to  
23 Ms. Jacks.

24 On page 30 of Exhibit 18, which is the  
25 Jerry Montoya transcript, on page 30 it says, "And I

1 think we need to cover the cameras because they're  
2 going to see myself and Jerry Armenta going into the  
3 cell to do this crime. And he says, 'No, no, we're  
4 not going to cover the camera because Dan Dan,  
5 Daniel Sanchez, didn't want the cameras covered.'"

6 And then page 36 indicates that Mr.  
7 Montoya had a conversation with Mr. Sanchez, and  
8 Mr. Sanchez asked Mr. Montoya if he knew what was  
9 going on, and Mr. Montoya said yes. So this relates  
10 once again to a conversation between Mr. Sanchez and  
11 Mr. Montoya about the Molina murder.

12 MS. JACKS: No objection.

13 THE COURT: Anybody else have an  
14 objection?

15 All right. And you're moving its  
16 admission, Mr. Castellano?

17 MR. CASTELLANO: Thank you, Your Honor.  
18 That's Exhibit 18.

19 THE COURT: You're moving its admission?

20 MR. CASTELLANO: Yes, sir, I am.

21 THE COURT: All right. Not hearing any  
22 objection, Government's Exhibit 18 will be admitted  
23 for purposes of hearing on motions 1841 and 2408.

24 (Government Exhibit 18 admitted.)

25 MR. CASTLE: Exhibit 19 is also a

1 transcript of Jerry Montoya. On page 49 of that  
2 transcript it indicates that Mr. Sanchez's position  
3 in the pod was the llavero. And this transcript is  
4 only pages 48 through 52 from that testimony.

5 MS. JACKS: Again, no objection.

6 THE COURT: Any objection from any other  
7 defendants?

8 You're moving its admission,  
9 Mr. Castellano?

10 MR. CASTELLANO: Yes, sir.

11 THE COURT: All right. Government's  
12 Exhibit -- this is going to be 19; correct?

13 MR. CASTELLANO: Yes.

14 THE COURT: It's admitted into evidence.  
15 (Government Exhibit 19 admitted.)

16 MR. CASTELLANO: I believe that's it, Your  
17 Honor.

18 THE COURT: All right. Thank you,  
19 Mr. Castellano.

20 Ms. Jacks, do the defendants have any  
21 rebuttal evidence they wish to present on this?

22 MS. JACKS: No.

23 THE COURT: All right, Ms. Jacks. Are you  
24 ready to argue your motion?

25 MS. JACKS: I am. I actually -- I

1 certainly am.

2 THE COURT: Ms. Jacks.

3 MS. JACKS: So do you want to start with  
4 the Brady issue that arose in trial or --

5 THE COURT: It's totally up to you. I've  
6 certainly been up here refreshing my memory, and I  
7 have this week on that issue, so it's your call.

8 MS. JACKS: Why don't I start with that,  
9 because I think really that's dealt with both in --  
10 there is the motion that's seeking a dismissal based  
11 on the intentional and deliberate violation of  
12 Brady. And then there's the arguments in the motion  
13 for a new trial, that the Brady violation justifies  
14 a new trial, and that the Brady violation is also a  
15 Rule 16 violation which should justify a new trial.

16 And I think the remedy -- I think it's  
17 clear, even Agent Stemo acknowledged that the  
18 statements attributed to Mr. Urquizo by Agent  
19 Sainato in his notes are at least different than  
20 what was previously disclosed and favorable to  
21 Mr. Sanchez. And I think the real question about  
22 what the remedy for the Brady violation is is: What  
23 was the Government's state of mind or level of  
24 culpability in not turning those over? Did they  
25 deliberately conceal those things to gain an unfair

1 tactical advantage at trial? Was it reckless or  
2 rushed and was a mistake? I think that's for the  
3 Court to decide. I do --

4 THE COURT: Can we go back just a second  
5 and tell me where we were on March 1st? Where were  
6 we in that trial? Where exactly were we?

7 MS. JACKS: The last day of evidence was  
8 March 2.

9 THE COURT: So these rolled out on the  
10 night of the 28th and we were dealing with them on  
11 the 1st?

12 MS. JACKS: Correct. The defense was in  
13 the middle of presenting its case. It was a month  
14 after Lupe Urquizo had testified that those notes  
15 were disclosed. And I would note that the  
16 statements that were particularly favorable to  
17 Mr. Sanchez, the idea, the statements that Mr.  
18 Urquizo and most of the other Government's  
19 testifying informants talked about killing  
20 Mr. Sanchez because he did not participate in the  
21 Molina murder or cover the cameras like he was  
22 supposed to, would have been information that would  
23 have informed the cross-examination not just of Mr.  
24 Urquizo, but each and every one of those Government  
25 informants who talked about, after the Molina

1 homicide, who participated in those alleged  
2 discussions about killing Mr. Sanchez. And I think  
3 as a trial lawyer -- I mean if I had known about  
4 that statement and that evidence, that would have  
5 been something that I would have brought out and  
6 discussed in opening statement, and it would have  
7 been a recurring theme through the cross-examination  
8 of almost each and every one of those Government  
9 informants.

10 THE COURT: And why did you or the other  
11 defendants choose not to recall any witnesses at  
12 that point to go over that?

13 MS. JACKS: I think I answered that  
14 question in my reply brief in support of my Rule 29  
15 and Rule 33 motion. And I think what I said -- I  
16 may not quote it directly, but that's like asking  
17 Mike Smith to change horses in the last stretch of  
18 the Kentucky Derby. You can't do it. I mean, it's  
19 a six-week trial. And to bring back witnesses who  
20 have been cross-examined for hours at a time,  
21 cross-examined at least in sort of -- as far as I'm  
22 concerned, I tried to be organized, make points,  
23 make points in a convincing fashion. And to bring  
24 back witnesses just to put them up on the witness  
25 stand and then on the last day of trial conduct a



1 one-topic cross-examination is, I would say, per se  
2 ineffective.

3 And the bottom line is what Brady says, is  
4 that the Government has an obligation to turn over  
5 favorable evidence to the defense in time for them  
6 to use it in their defense.

7 And in my reply, I also quoted case law,  
8 which talks about the fact that if the defense could  
9 have been more effective or more persuasive, that's  
10 sufficient.

11 And you know, in talking with Mr. Lowry  
12 last night, he reminded me of a discussion that the  
13 Court had with the Government, and this is in  
14 pretrial proceedings probably in 2017 when we were  
15 talking about their Brady obligation. And what the  
16 Court said was: This was a review that should be  
17 conducted by attorneys' eyes. The attorneys need to  
18 take responsibility. The Government prosecutors  
19 need to take responsibility for identifying and  
20 disclosing Brady information.

21 And what we have here -- I mean, at best,  
22 what we have here is a Government lawyer that  
23 participated in the conversation but didn't disclose  
24 the information to Mr. Sanchez for whatever reason,  
25 which goes unexplained, because we're unable to call

1 him as a witness. And we have a brand-new FBI agent  
2 making judgments about what is or is not new  
3 information or impeaching or different --  
4 information regarding a different version of events  
5 by the same witness.

6 I mean, I just think the Government  
7 utterly failed. And in a different situation, maybe  
8 this failure wouldn't have the impact that it has on  
9 Mr. Sanchez. But this is an epic failure, and it  
10 affected his entire trial strategy and defense, and  
11 I think -- I mean, it's just inexcusable. The  
12 Government knew on January 22 that Lupe Urquizo  
13 complained that Daniel Sanchez did not participate  
14 in the Molina homicide. And what he goes on to say  
15 is contradictory of even the Government's theory  
16 that Sanchez is the one that's assigning the roles  
17 and controlling everything, because the next part of  
18 that statement is that Mr. Sanchez didn't cover the  
19 cameras like he was supposed to. Wait a minute. I  
20 thought he was supposed to be the boss. He's giving  
21 assignments, not taking them. So I think it's  
22 inexcusable.

23 THE COURT: All right.

24 MS. JACKS: The other -- I guess I'll go  
25 on. With respect to the Rule 29 and new trial

1 motion, I think I've answered the Government's  
2 points and arguments. I'm happy to discuss  
3 something specific. But what I see when I look back  
4 and try to consider what happened is really just one  
5 failure after another compounding the prejudice to  
6 Mr. Sanchez at this trial. And I think it's -- I  
7 don't know, I found it sort of amusing, not really  
8 but just sort of, but even in the Government's  
9 response to my motion, they get it twisted up as to  
10 what evidence is admissible or inadmissible against  
11 Mr. Sanchez. How could the jury possibly have kept  
12 track?

13 THE COURT: Give me an example where you  
14 think they get confused about it.

15 MS. JACKS: It's in there. Let me pull  
16 it. So basically, in one of the sections of my  
17 motion for a new trial was that there were  
18 statements of co-defendants that came in as  
19 admissions against those co-defendants that the jury  
20 wasn't supposed to consider against Mr. Sanchez.  
21 And I argued -- and I think I even argued this  
22 pretrial -- that those, quote, "inadmissible  
23 statements" that aren't to be considered against  
24 Mr. Sanchez are statements that corroborate or tend  
25 to corroborate the Government's informants.

1           So the jury is being asked to weigh the  
2     credibility of informants, knowing that  
3     co-defendants have made statements that corroborate  
4     them, but ignoring that fact and testing the weight  
5     of the -- or the convincing force of the  
6     Government's case against Mr. Sanchez. And I think  
7     it's an impossible task.

8           And in the Government's response in  
9     arguing -- this is Document 2451 -- in arguing  
10    against Mr. Sanchez' point, the Government cites the  
11    statements of -- let's see. Recites the statements  
12    of Rudy Perez. This is on page 5 of their motion.  
13    The paragraph that starts, "The defendant himself  
14    concedes a number of points that are sufficient to  
15    overcome his Rule 29 motion." And then they talk  
16    about Mr. Perez' statements.

17           I mean, the point is that they're not  
18    considered -- the statements can't be considered  
19    against Mr. Sanchez at trial, they shouldn't be used  
20    by the Government to argue against a motion for a  
21    new trial at this point. If they're not admissible  
22    against him, they're not admissible. Have I made  
23    that point clear?

24           THE COURT: Yeah, I think so. I'll look  
25    again at what the specific statements are. I don't

1 have a --

2 MS. JACKS: Well, there's a litany of the  
3 statements in my motion for a new trial. It's in  
4 section 28A, and the statements that I cited start  
5 on page 32 and go through page 34. And these are  
6 portions of the various recordings for the most  
7 part.

8 THE COURT: All right. What else,  
9 Ms. Jacks?

10 MS. JACKS: Unless the Court has something  
11 specific, I feel pretty comfortable that I've put my  
12 arguments in writing.

13 THE COURT: Thank you, Ms. Jacks.

14 Any other defendant want to speak on  
15 Ms. Jacks', Mr. Sanchez' two motions?

16 All right. Mr. Castellano, are you going  
17 to respond on these?

18 MR. CASTELLANO: Ms. Jacks' primary  
19 arguments with Mr. Urquizo really hinges on whether  
20 or not information in Agent Sainato's notes is  
21 exculpatory. And it's not exculpatory. As it was  
22 argued even in Document 1850 at trial, which was the  
23 Government's response to the motions to dismiss, the  
24 Government made clear, even back then, that the  
25 information had already been disclosed, and the

1 March 2017 debrief notes of --

2 THE COURT: I guess her argument -- I'm  
3 sort of trying to characterize it. You're saying  
4 it's not exculpatory because it shows that he's  
5 still involved in the murder. I guess she's saying  
6 that she might have -- I don't quite know what the  
7 change in theory would have been, but instead of  
8 your argument being that he was the one calling the  
9 shots, your argument would have been -- or I guess  
10 I'm not quite sure what the argument would be that  
11 he was taking the orders from somebody else.

12 MR. CASTELLANO: Ms. Jacks continues to  
13 argue what the Government's theory was, but what our  
14 theory is doesn't matter. What matters is what the  
15 evidence showed at trial, and that's what matters.  
16 That's the decision on which the jury based its  
17 verdict.

18 So theories aside, what matters is the  
19 trial evidence. And what also matters is that she  
20 had the information prior to trial, because the  
21 March 2017 notes indicate basically the same thing  
22 that were in Agent Sainato's notes. She just  
23 quibbles with the fact that there's an "or" there,  
24 he didn't participate in the murder or cover the  
25 cameras like he was supposed to. But at issue, he

1 didn't cover the cameras like he was supposed to,  
2 and he also didn't participate like he was supposed  
3 to, and that's supported by other testimony.

4           So for example, in Document 1850, footnote  
5 1, it says, "Another way to say that defendant  
6 Sanchez should be hit because he didn't do his job  
7 to cover the camera is to say that Rodriguez and  
8 Urquizo agreed to put a hit on defendant Sanchez  
9 because he did not participate in the Molina  
10 homicide or even cover the cameras like he was  
11 supposed to."

12           It's really a different way of saying the  
13 same thing. And I introduced the testimony from  
14 Jerry Montoya this afternoon because there's also an  
15 indication that Jerry Montoya had asked about the  
16 cameras specifically, because he didn't want to be  
17 captured committing the murder with Jerry Armenta.  
18 And his response was from Mario Rodriguez, who said  
19 Daniel Sanchez does not want to cover the cameras.

20           So there is other testimony in the case  
21 consistent with the reason that Mr. Sanchez was  
22 considered to have failed as a leader, and that's  
23 because he can't cover the cameras; and clearly it  
24 was even on Jerry Montoya's mind, and he wasn't even  
25 the one calling any of the shots. So it's really a

1 different way of saying the same thing. They had  
2 that information prior to trial.

3           Also during trial, during Billy Cordova's  
4 testimony, we again tried to bring out this  
5 information that Mr. Sanchez was part of the  
6 conspiracy and that he failed on his part to collect  
7 the shank and to cover the cameras. And so  
8 eventually Ms. Jacks actually objected to that  
9 evidence at trial, describing it as cumulative.  
10 That is on Government's Exhibit 8, I believe. I'll  
11 show it to the Court here in a second. This is a  
12 discussion on the record in this exhibit, and  
13 Ms. Jacks wants to know what the relevance is. And  
14 ultimately it's actually -- she's actually the one  
15 who tries to keep out this additional evidence that  
16 there was conspiracy to murder Mr. Sanchez for two  
17 things: Not taking the shank and not covering the  
18 cameras.

19           So actually, she had chances at trial to  
20 delve into this, but she actually thought it was  
21 cumulative and didn't want to hear more evidence of  
22 this murder conspiracy. So it was actually her  
23 objection at trial that kept out further evidence.  
24 So I don't think that she would have changed  
25 anything, because there was nothing to change. We



1 were bringing it in and she was trying to keep it  
2 out.

3 And prior to that I'll show the Court also  
4 on Exhibit 8 the discussion -- this is a part where  
5 Mr. Cordova is referring to the discussion --

6 THE COURT: Are you able to blow that up a  
7 little bit?

8 MR. CASTELLANO: Yes. The discussions, it  
9 reads, "Did you have concerns about Daniel Sanchez  
10 not having disposed of the shanks like he was  
11 supposed to?" That sounds like a familiar phrase in  
12 this case.

13 And the response of Mr. Cordova was,  
14 "Well, any good brother would." "Any good brother  
15 would," because when there is foul play within the  
16 onda, you leave a brother flojas, that's part of the  
17 rules, not supposed to leave him stranded during the  
18 mission.

19 So this is information that came through a  
20 number of trial witnesses, and it was the same  
21 information each time. There was failure in  
22 leadership by Mr. Sanchez. Once again, this was  
23 information we tried to bring in at trial and  
24 eventually Ms. Jacks -- her objection was that it  
25 was cumulative. Clearly at trial they did not want

1 to hear more of this information. They wanted to  
2 hear less. So I'm not convinced that her  
3 examination of each of these witnesses would have  
4 been different, and if it would have been, how would  
5 it have been different? The only question is:  
6 Isn't it true that Lupe Urquizo said, you tried to  
7 kill him because he was involved with the murder?  
8 And what are each of those witnesses going to say  
9 about that? They're going to say it's not true or  
10 "I don't know what he said."

11 So what she would be asking is about a  
12 hearsay statement by another cooperator in the case.  
13 So that wouldn't have formed the testimony of the  
14 other cooperators. And the other cooperators had  
15 already testified that there was a conspiracy to  
16 murder Daniel Sanchez, so that information was  
17 already out there and had been out there for some  
18 time.

19 THE COURT: Let me make sure I understand  
20 the facts. What occurred on the 28th was, they had  
21 had the 302 for a while, but -- and how long had  
22 they had that 302?

23 MR. CASTELLANO: The 302 that Agent Stemo  
24 prepared or --

25 THE COURT: Yes.

1 MR. CASTELLANO: The one that she had was  
2 probably disclosed around the 29th or 30th. I don't  
3 know. That's why I attached the discovery letters.

4 THE COURT: Of February?

5 MS. JACKS: January.

6 THE COURT: January.

7 MS. JACKS: The first day of trial.

8 THE COURT: So then the notes of the other  
9 agent -- that's what was produced on the evening of  
10 the 28th.

11 MR. CASTELLANO: Yes. The agent's notes  
12 from the 22nd were produced toward the end of trial,  
13 but the March 2017 report I think was disclosed two  
14 weeks before trial with the other Jencks materials,  
15 and that was the information which was basically  
16 cumulative and already stated the same things as the  
17 Sainato notes, which was he failed, he didn't cover  
18 the cameras, he didn't take Jerry Armenta's shank,  
19 and there was a conspiracy to murder him. So that  
20 was not new information.

21 MS. JACKS: Your Honor, Mr. Castellano  
22 keeps arguing this, but his own FBI agent this  
23 morning conceded that there were things in the notes  
24 that were not covered in the 302s.

25 THE COURT: Well, I'll let you have

1 rebuttal. Let me let Mr. Castellano finish.

2 MR. CASTELLANO: Well, she's referring to  
3 other things, but what she's claiming as exculpatory  
4 is one statement. So once again, how would she  
5 examine other witnesses based on a report by Lupe  
6 Urquizo when there were other reports indicating the  
7 same thing?

8 Now, going back to the other witnesses'  
9 statements, unless the Court is willing to change  
10 its ruling on the admission of the other statements,  
11 there is not much more to say about that. The Court  
12 ruled that other statements were admissible at  
13 trial, and it's not a confusion about the evidence  
14 or the use of the evidence. I mean, what Ms. Jacks  
15 herself said in the pleading was that that  
16 information tended to corroborate what other  
17 witnesses said. It doesn't mean that the jury had  
18 to use the other corroborating information against  
19 other defendants. What it means is, it strengthened  
20 the testimony of cooperators. So if there is other  
21 information in the case which causes us to believe  
22 what somebody says, she herself admits that that was  
23 information that corroborated those witnesses. So  
24 there is a difference there.

25 Other than that, I think the rest of the

1 pleadings speak for themselves, Your Honor. If it's  
2 not clear from the attachments, one of the  
3 attachments has an exhibit which is a transcript  
4 that has boxes around it. And if the Court hasn't  
5 figured that out, it's in color normally, but in  
6 that transcript there are boxes around certain  
7 sections of testimony, and inside those boxes, that  
8 is what was redacted. And so her pleading indicated  
9 that the recordings brought in direct evidence of  
10 Mr. Sanchez' guilt. I attached one example of the  
11 redactions we did at trial, and inside those boxes  
12 are what were redacted. So you'll see the  
13 defendants' names inside those boxes, but that  
14 information didn't go to the jury.

15 That's all I have, unless the Court has  
16 questions.

17 THE COURT: Well, it wasn't played to the  
18 jury; correct? When we redacted out?

19 MR. CASTELLANO: They were played to the  
20 jury. We had to redact the audio and we redacted  
21 the transcripts, both. So that information did go  
22 to the jury and if you look inside the boxes --

23 THE COURT: But the stuff in the boxes  
24 didn't go to the jury either orally or in writing;  
25 correct?

1 MR. CASTELLANO: That's correct. So if  
2 you heard the audio and you saw the transcript,  
3 wherever there is a box in the transcript, that was  
4 also cut from the audio. So there was no direct  
5 evidence of anyone else's guilt, other than the  
6 declarants.

7 THE COURT: My memory on the transcripts,  
8 we didn't even show the boxes. We just cut those  
9 out. We collapsed them so there wasn't even an  
10 indication to the jury anything had been taken out;  
11 right?

12 MR. CASTELLANO: That's correct. The jury  
13 had no idea that the transcripts were redacted, or  
14 the recordings. And some of those redactions even  
15 started after trial. So we did 11th-hour-plus  
16 redactions at the defendants' request to keep that  
17 information out.

18 I don't have anything else unless the  
19 Court has questions, Your Honor.

20 THE COURT: All right. Thank you, Mr.  
21 Castellano.

22 Any other defendant before I hear from  
23 Ms. Jacks?

24 All right, Ms. Jacks. Do you have further  
25 arguments on your two motions?

1 MS. JACKS: I'm not going to belabor this.  
2 What was contained in those Sainato notes that were  
3 withheld by the Government until the second-to-last  
4 day of trial was an unequivocal statement by Urquizo  
5 that Daniel Sanchez did not participate in the  
6 Molina homicide. I don't know how much more  
7 favorable or exculpatory a statement gets. And  
8 Agent Stemo conceded, not -- she did finally concede  
9 this morning in her examination that that  
10 information is not contained in any report that was  
11 ever turned over to the defense prior. And for  
12 Mr. Castellano to sort of speculate how I might  
13 cross-examine if I had known that information, I  
14 mean, I think it's ridiculous. Do you want to know  
15 how I'm going to cross-examine? Give me the  
16 information and I'll do it.

17 THE COURT: Why didn't you pull him up  
18 just for that one statement? Wouldn't that have  
19 been worth it if it's so important now?

20 MS. JACKS: Well, no, because my point is  
21 that the way to use this information will be to  
22 weave it into your defense throughout the trial,  
23 that Mr. Sanchez did not participate. He didn't  
24 participate, he didn't do anything. He didn't order  
25 it. He didn't assign roles. He didn't get the

1 walker from Rudy Perez. He did not participate.

2 And you heard Agent Stemo say each one of those  
3 things was participation in the homicide.

4 THE COURT: Wasn't that your defense?  
5 That's what I remember --

6 MS. JACKS: Well, it was.

7 THE COURT: -- throughout. You just said  
8 Mr. Sanchez didn't -- he wasn't involved in any of  
9 that.

10 MS. JACKS: It was my defense, but Brady  
11 applies to information that would have made my  
12 defense better, made my defense more convincing.  
13 And Mr. Castellano is right. I didn't delve into  
14 the conversation that all his informants supposedly  
15 had about killing Mr. Sanchez, because I didn't  
16 know -- Mr. Castellano hadn't turned the information  
17 over to me -- that they wanted to kill him because  
18 Mr. Sanchez did not participate.

19 I mean, you're hiding the ball for almost  
20 the whole trial and then complaining I wasn't  
21 kicking it for the month prior. It's ridiculous.  
22 And I just -- I think it's a disingenuous way to try  
23 to get away with what is an alarming violation of  
24 Brady. And it wouldn't be asking witnesses, other  
25 witnesses, about hearsay statements of Urquizo.



1 Urquizo talked about a meeting where they all got  
2 together and suggested, "Let's kill Sanchez because  
3 he didn't help us with Molina."

4 That's a big deal, especially when it's a  
5 conspiracy to commit murder and a murder. And what  
6 the -- you know, what the statement means to me is  
7 he didn't participate in the murder and he didn't  
8 cover the cameras like he was supposed to. In other  
9 words, Rodriguez told him, "Cover the cameras," and  
10 he didn't do it. That's evidence he didn't agree.  
11 That's evidence he didn't agree with the other  
12 people's decision to kill Javier Molina. It's  
13 exculpatory. And it was withheld, and we still  
14 don't know exactly why. The Government seems to say  
15 that it's not -- I mean, they're trying to argue  
16 it's not even favorable. I mean -- I don't know.  
17 It's alarming.

18 And I think Mr. Sanchez, because the case  
19 against him was based solely on the testimony of  
20 informants who are expecting favorable treatment  
21 from this Court by fingering Mr. Sanchez, it really  
22 hurt his ability to present his defense. And you  
23 want to add onto that the pretrial publicity, the  
24 secret emails between the marshals and the Court  
25 that was reported in the paper, all the inadmissible

1 evidence that came in that the jury is not supposed  
2 to consider in evaluating the Government's case  
3 against Mr. Sanchez. You know, you add all that up,  
4 and he never had a chance at a fair trial.

5 THE COURT: Well, I think Mr. Sanchez got  
6 a fair trial. I'm going to deny the motions. I'll  
7 give you an opinion on it.

8 All right. Let's move to the next motion.  
9 Let's go to Mr. Herrera's motion for a new trial.

10 MS. BHALLA: Thank you, Your Honor.

11 THE COURT: Ms. Bhalla.

12 MS. BHALLA: I'm going to get a little  
13 organized up here, Your Honor, if you could give me  
14 just a second.

15 Your Honor, I did spend some time speaking  
16 to the Government about what evidence we wanted to  
17 present today, and I think that the Government has  
18 agreed to allow me to tender some exhibits to the  
19 Court for the Court's consideration, and  
20 additionally one proffer, which I'll get to in a  
21 minute, Your Honor. But for now, we're going to go  
22 ahead and move into admission Defendant's Exhibits A  
23 through G. Some of these were admitted -- or not  
24 admitted; some of these were attached to our motion,  
25 Your Honor, and there is one additional exhibit that

1 was not attached to our motion, which is G.

2 For purposes of trying to keep the  
3 original filing not too long, I didn't do complete  
4 transcripts in regard to Exhibit F and with regard  
5 to Exhibit A, but for purposes of the hearing I  
6 wanted the Court to have the full record, so I have  
7 those ready to tender to the Court.

8 THE COURT: All right. Do you have a  
9 number on this if we can mark these?

10 MS. BHALLA: I did, Your Honor. I marked  
11 them as Defendant's Exhibit A to Document Number  
12 2413 --

13 THE COURT: Sounds good.

14 MS. BHALLA: -- which is how I believe --

15 THE COURT: Any objection to Exhibit A  
16 coming in, Mr. Castellano?

17 MR. CASTELLANO: I don't think so, Your  
18 Honor. If I could just look at the exhibits to see  
19 what they are. I think we have an agreement.

20 MS. BHALLA: That's correct, Your Honor.  
21 These are ones that we had talked about before.  
22 Defendant's Exhibit A, which is a letter from  
23 Timothy Martinez's wife to Timothy Martinez, which  
24 was located in Mario Rodriguez' property.

25 MR. CASTELLANO: No objection, Your Honor.

1 THE COURT: All right. Any other  
2 defendant have any objection? All right, so  
3 Herrera's Exhibit A will be admitted for purposes of  
4 2413 and 2481.

5 (Defendant Herrera Exhibit A admitted.)

6 MS. BHALLA: Thank you, Your Honor. I'll  
7 just go through the exhibits, if that's all right  
8 with the Court. Exhibit B is a letter from Mario  
9 Rodriguez to the court clerk that was also found in  
10 Mario Rodriguez' property, Your Honor.

11 THE COURT: Any objection?

12 MR. CASTELLANO: No objection.

13 THE COURT: Any objection from any other  
14 defendant?

15 Not hearing any, you're moving all these,  
16 Ms. Bhalla?

17 MS. BHALLA: Yes.

18 THE COURT: So Herrera Exhibit B for  
19 purposes of this hearing will be admitted into  
20 evidence.

21 (Defendant Herrera Exhibit B admitted.)

22 MS. BHALLA: Exhibit C is a note from --  
23 one of these notes that was produced late regarding  
24 the investigation into the Javier Molina murder, and  
25 it's a reflection of statements made -- I have to

1 look at my notes, Your Honor. We can get to this a  
2 little bit, Your Honor. It's an agent's notes about  
3 their investigation that was disclosed later in  
4 trial. It's attached as Exhibit 3 to our document  
5 which was filed on October 15, Your Honor.

6 THE COURT: All right. This is Exhibit C.  
7 Any objection, Mr. Castellano?

8 MR. CASTELLANO: No, Your Honor.

9 THE COURT: Any other defendant?

10 Not hearing any objection, Herrera Exhibit  
11 C will be admitted into evidence.

12 (Defendant Herrera Exhibit C admitted.)

13 MS. BHALLA: Thank you, Your Honor.

14 Exhibit D will be a questionnaire that was  
15 submitted to Mario Rodriguez.

16 THE COURT: Any objection to that? This  
17 is D?

18 MS. BHALLA: Correct.

19 THE COURT: Any objection, Mr. Castellano?

20 MR. CASTELLANO: No, Your Honor.

21 THE COURT: Any other objection?

22 Not hearing any other objection, Herrera  
23 Exhibit D will be admitted to this hearing.

24 (Defendant Herrera Exhibit D admitted.)

25 MS. BHALLA: Thank you, Your Honor.

1           Exhibit E, Your Honor, is a 302 regarding  
2 an investigation that took place after this trial --  
3 or it might be during the midst of this trial; it's  
4 unclear; we'll get to that -- that concerns Billy  
5 Cordova's testimony in trial.

6           THE COURT: All right. Any objection to  
7 Exhibit E, Mr. Castellano?

8           MR. CASTELLANO: No objection, Your Honor.

9           THE COURT: Any other defendant have any  
10 objection?

11           Not hearing any, Herrera Exhibit E will be  
12 admitted for purposes of the hearing on 2413 and  
13 2431.

14           (Defendant Herrera Exhibit E admitted.)

15           MS. BHALLA: Thank you, Your Honor.

16           Exhibit F is a transcript of a phone call  
17 between Special Agent Acee and Joe Martinez that  
18 occurred in the summer of 2018. We'll be moving the  
19 admission of that transcript.

20           THE COURT: Any objection, Mr. Castellano?

21           MR. CASTELLANO: If I can clarify, it's  
22 the entire transcript?

23           MS. BHALLA: It is.

24           MR. CASTELLANO: Just for the record, one  
25 of the attachments to the pleading was not the

1 entire transcript, and it was also in mine, so I  
2 have no objection to that.

3 THE COURT: All right. Any objection from  
4 any other defendant?

5 Not hearing or seeing any objection,  
6 Herrera Exhibit F will be admitted for the purpose  
7 of the hearing on 2413 and 2431.

8 (Defendant Herrera Exhibit F admitted.)

9 MS. BHALLA: Thank you, Your Honor.

10 The next exhibit we're going to admit was  
11 not attached to the motion originally, Your Honor.  
12 It's something that we just received. It's  
13 Defendant's Exhibit G. It's a 302 regarding a  
14 previous conversation with Joe Martinez by the FBI.

15 THE COURT: Any objection to Exhibit G,  
16 Mr. Castellano?

17 MR. CASTELLANO: No, Your Honor.

18 THE COURT: Any other defendant have any  
19 objection?

20 Herrera Exhibit G will be admitted for  
21 purposes of the 2431 and 2413 hearing on those  
22 motions.

23 (Defendant Herrera Exhibit G admitted.)

24 MS. BHALLA: Thank you, Your Honor. May I  
25 approach?

1 THE COURT: You may. Before you get  
2 those, let me get a stack of what we had on the last  
3 one. Let's keep those separate. So do you have  
4 yours up here, Ms. Jacks?

5 MS. JACKS: I did. I stacked them up.

6 THE CLERK: They're right here.

7 THE COURT: Do we have the ones also for  
8 the first hearing? There was a handful of those.  
9 Give me those, and let me put those in the folder.  
10 Is that for the first two motions?

11 THE CLERK: Yes.

12 THE COURT: Who had FV and FL? Were those  
13 yours, Ms. Jacks?

14 MS. JACKS: Excuse me, Your Honor?

15 THE COURT: We're trying to -- take a look  
16 at these so I can put these in the correct folders.  
17 Take a look at these. Are those all related to your  
18 motions?

19 Mr. Castellano, if you'd take a look at  
20 it. Or are some of those related to Mr. Billy  
21 Garcia's?

22 THE CLERK: Here are the ones just now.  
23 These are related to Mr. Herrera's motion.

24 THE COURT: Those are all yours?

25 MR. CASTELLANO: Yes, Your Honor. For the



1 record, I think 1 through 15 have Government's  
2 Exhibit and the number at the bottom of the  
3 documents.

4 MS. BHALLA: There are some here.

5 MR. CASTELLANO: So Government's Exhibit  
6 13 also has a sticker which says Defendant's Trial  
7 Exhibit FV.

8 THE COURT: But those all relate to Mr.  
9 Sanchez' motions?

10 MR. CASTELLANO: Yes, sir.

11 THE CLERK: So these are all the ones  
12 related to Mr. Sanchez' motion.

13 THE COURT: And that other stack was, too?

14 THE CLERK: No. The stack I just gave you  
15 with the blue labels, that's related to Mr.  
16 Herrera's motion.

17 THE COURT: But the ones earlier were  
18 related to J, and I've got yours now, Mr. Lucero,  
19 Ms. Bhalla?

20 MS. BHALLA: I believe so, Your Honor.

21 THE COURT: All right. Do you have any  
22 other witnesses or evidence you wanted to present on  
23 your motion?

24 MS. BHALLA: The only other evidence we're  
25 going to present, Your Honor, is in the form of a

1 proffer. If I can sort of briefly explain to the  
2 Court why that might be necessary. I don't believe  
3 there is going to be an objection by the Government  
4 to that proffer.

5 After trial, Agent Acee communicated via  
6 telephone with Joe Martinez, also known as Cheech.  
7 David Calbert testified at trial that Cheech is the  
8 one who passed him the paperwork authorizing the hit  
9 on Javier Molina. In that transcript, which the  
10 Court will review -- oh, I don't know. Do you have  
11 a copy, Your Honor, of Defendant's Exhibit F up  
12 there? I just want to make sure, because I think I  
13 have two of them with stickers. I just want to make  
14 sure you have yours.

15 THE COURT: I do have an F.

16 MS. BHALLA: Thank you, Your Honor.

17 THE COURT: That's the transcript of --

18 MS. BHALLA: Thank you, Your Honor. There  
19 is only one transcript, so that should be it.

20 In any event, after receiving this  
21 transcript and reviewing, it became apparent there  
22 was information in there that the defense team  
23 wanted to follow up on. We attempted lots of  
24 different ways to get into contact with Mr.  
25 Martinez. We were able to finally serve him with a

1 subpoena in Deming, New Mexico, when he was home for  
2 Thanksgiving. We are fairly confident that he  
3 received that subpoena, because after receiving it,  
4 he called our office. There is no other way he  
5 would have known that we were trying to communicate  
6 with him, other than receiving that subpoena.

7 I was able to speak to him, and the  
8 information that he relayed to me was that -- the  
9 important part of that information is -- there's  
10 three actual things, I think. The first important  
11 thing was: There was no way he was going to show up  
12 here today, and denied having received the subpoena  
13 from our office, despite the fact that there was no  
14 way he could have ever gotten in touch with us other  
15 than receiving that subpoena.

16 And two, that he did, in fact, speak with  
17 Agent Acee in December of 2016 about two issues.  
18 One of them was the Molina homicide paperwork, and  
19 one of them was about an investigation involving  
20 him, where he was alleged to have been involved in  
21 the murder.

22 Essentially what was relayed to me by Mr.  
23 Martinez was that he had already explained to the  
24 FBI how the story of the paperwork coming down was  
25 impossible, that it had never happened the way that

1 they said it happened, and that it could not, in  
2 fact, have happened the way they said it happened.  
3 And that conversation is fairly relayed in the  
4 transcript before Your Honor.

5 The other issue that Mr. Martinez brought  
6 to our attention was that he believed Billy Cordova  
7 had framed him for a murder he did not commit. Some  
8 of that information appears to be involved in  
9 Defendant's Exhibit G, but it's still something that  
10 is a little bit unclear, and something that would  
11 have been helpful to have had, obviously, before  
12 trial, and I can explain why that information would  
13 have been helpful later. But that's my proffer to  
14 the Court regarding Mr. Martinez' statements to our  
15 office, Your Honor.

16 THE COURT: All right. Any other witness  
17 or evidence in support of your motion?

18 MS. BHALLA: No, Your Honor.

19 THE COURT: Ms. Jacks, you joined this  
20 motion. Anything you have to add to the motion?

21 MS. JACKS: No, Your Honor.

22 THE COURT: All right. How about you,  
23 Mr. Castellano? Do you have any witnesses or  
24 evidence you want to present on the motion?

25 MR. CASTELLANO: I will have some

1 exhibits, Your Honor.

2 THE COURT: Why don't you do those now.  
3 We'll see then if that causes Ms. Bhalla to have any  
4 other witnesses or evidence.

5 MR. CASTELLANO: And while I'm doing that,  
6 I don't know -- Ms. Bhalla asked me if I'd be  
7 willing to accept a proffer. I'm not sure -- I  
8 haven't made a final decision what to think about  
9 that proffer, because Mr. Martinez, also known as  
10 Cheech, is actually implicated in two of the murders  
11 charged in this chase. He was implicated in the  
12 Javier Molina murder as having sent down the  
13 paperwork. He was also implicated in Trial 2 in the  
14 Freddie Sanchez murder as having sent down the  
15 paperwork, I believe through Kyle Dwyer and then  
16 eventually to Ben Clark.

17 So I mean, if the Court wants to accept a  
18 proffer, maybe that's fine. But the question is:  
19 What weight do we give to the proffer to Mr.  
20 Martinez, who was not responding to a subpoena and  
21 is implicated in two murders? So the transcript --

22 THE COURT: So all that that was proffered  
23 would come through Mr. Martinez.

24 MR. CASTELLANO: Yes, who has made himself  
25 unavailable, and I understand Ms. Bhalla may not

1 want to take time, understandably, to have him  
2 arrested and brought to court, because I think if he  
3 hits the stand, he's going to say nothing, because  
4 he is facing exposure and he would need an attorney  
5 before he hit the stand, based on him being  
6 implicated in two separate murders in two separate  
7 trials.

8           Once the Court looks at the transcript of  
9 the recording by Agent Acee, it says a number of  
10 interesting things which tend to corroborate what  
11 other witnesses said at trial, and that's that he  
12 was aware of the paperwork, he had seen the  
13 paperwork, he was around at the time that the  
14 paperwork was there, along with some of the other  
15 participants. And so he admits pretty much  
16 everything with the exception of his participation  
17 in the Molina murder.

18           So it's kind of an interesting set of  
19 facts. I guess a denial by him maybe means  
20 something, but I think it doesn't, based on the fact  
21 that he's facing exposure for two different murders.  
22 So if the Court is willing to accept that proffer, I  
23 think it's important to put it in proper context.  
24 One, he hasn't responded to the subpoena he appears  
25 to have been properly served; and two, he's

1 implicated. So therefore, it's not surprising he  
2 would give a self-serving denial to Agent Acee after  
3 otherwise corroborating other evidence in the case,  
4 including having personally read the paperwork  
5 related to Javier Molina.

6 THE COURT: Well, I'm not sure, Ms.  
7 Bhalla, what I can really do with the proffer. The  
8 Government is saying, yeah, we accept the proffer  
9 and that could be the basis of the motion, and I  
10 could, but if they're not willing to do it, then  
11 without his testimony, I'm not sure that I can do  
12 anything. And I think we're all sort of probably  
13 predicting that we're never going to get his  
14 testimony.

15 MS. BHALLA: I think that's fair to say.  
16 Especially, Your Honor, since we know that he's not  
17 in state, which makes the matter more complicated.  
18 And I will say this: In response to our discovery  
19 requests, the Government did provide an additional  
20 302, heavily redacted, which is Defendant's Exhibit  
21 G. Providing this document makes the proffer less  
22 necessary than it was last week. I think that we  
23 can proceed without it. But if they're willing to  
24 stipulate it, it might make a more complete record.

25 THE COURT: All right. It doesn't look

1 like they're willing to. So unless they are,  
2 probably we're going to have to proceed without it.  
3 I might drop a footnote. I guess my initial  
4 impression is, it's not going to make any  
5 difference. But I might drop a footnote and  
6 consider it, saying even if I considered it, this is  
7 how I'd come out.

8 All right. What else do you have as far  
9 as witness or evidence, Mr. Castellano?

10 MR. CASTELLANO: I would once again ask  
11 the Court to admit as exhibits the attachments to  
12 this response. So this response is the Government's  
13 Document 2454. Attachment 1 is, once again, the  
14 discovery letters which the Court has heard about  
15 from Daniel Sanchez' motion.

16 THE COURT: Are we going to give these  
17 separate exhibit numbers or just --

18 MR. CASTELLANO: I think we can start  
19 over, Your Honor. And they are numbered. For  
20 example, the first one is Document 2454-1, and I  
21 would treat that as Government's Exhibit 1 for  
22 purposes of this motion.

23 THE COURT: Any objection, Ms. Bhalla?

24 MS. BHALLA: No, Your Honor.

25 THE COURT: Ms. Jacks, any objection?



1 MS. JACKS: No, Your Honor.

2 THE COURT: I don't know if any other  
3 defendant joined. But not hearing any objection,  
4 Government's Exhibit 1 to the hearing on 2413 and  
5 2431 will be admitted into evidence.

6 (Government Exhibit 1 admitted.)

7 MR. LOWRY: Your Honor, just for the  
8 record, Defendant Baca did join.

9 THE COURT: You did. All right. I'll ask  
10 all defendants, then, and I'll sort out the joinder  
11 when I --

12 MR. CASTELLANO: Government's Exhibit 2 is  
13 Document 2454-2. Also at the bottom of that  
14 document it says Government's Exhibit 2, and it's  
15 Defendants' Exhibit FL from trial.

16 THE COURT: All right. Any objection?

17 MS. BHALLA: No, Your Honor. Thank you.

18 THE COURT: Any objection to that by any  
19 other defendants?

20 MS. JACKS: No.

21 THE COURT: Not hearing or seeing any,  
22 Government's Exhibit 2 will be admitted for purposes  
23 of the hearing on 2413 and 2431.

24 (Government Exhibit 2 admitted.)

25 MR. CASTELLANO: Government's Exhibit 3 is

1 marked Document 2454-3. At the bottom it says  
2 Government's Exhibit 3, and in the lower right-hand  
3 corner is Defendants' Trial Exhibit FV.

4 MS. BHALLA: No objection, Your Honor.

5 THE COURT: Any other defendant have any  
6 objection?

7 Not seeing or hearing any, Government's  
8 Exhibit 3 will be admitted for purposes of 2413 and  
9 2431.

10 (Government Exhibit 3 admitted.)

11 MR. CASTELLANO: Exhibit 4 is Document  
12 2454-4. At the bottom it's Government's Exhibit 4,  
13 and this is duplicative of the defense exhibit.  
14 This is the entire transcript of the Bryan Acee/Joe  
15 Martinez conversation.

16 MS. BHALLA: No objection.

17 THE COURT: Any other defendant have any  
18 objection?

19 Not seeing or hearing any objection,  
20 Government's Exhibit 4 for purpose of the hearing on  
21 2413 and 2431 will be admitted into evidence.

22 (Government Exhibit 4 admitted.)

23 MR. CASTELLANO: I think that's it for  
24 now. I may have some additional transcripts  
25 introduced. But I think for now that is it.

1 THE COURT: All right. Ms. Bevel, if  
2 you'll get those exhibits from Mr. Castellano.

3 Ms. Bhalla, do you have further rebuttal  
4 witnesses or evidence you want to present?

5 MS. BHALLA: No, Your Honor.

6 THE COURT: Any other defendants have any  
7 other evidence or testimony they want to present?

8 All right, Ms. Bhalla, if you wish to  
9 argue in support of your motion, you may do so at  
10 this time.

11 MS. BHALLA: I will, Your Honor. Thank  
12 you.

13 I don't intend to address everything that  
14 was briefed, Your Honor, but I do want to start with  
15 what I think are some of the more important points.  
16 And one of those -- I kind of want to start a little  
17 bit with the case law, Your Honor, and one of the  
18 questions that I anticipated today that you asked  
19 Ms. Jacks is how exactly would you have changed your  
20 trial strategy, had you had some of this information  
21 before trial?

22 And I want to just read a little bit from  
23 United States v. Burke. It's a Tenth Circuit 2009  
24 case cited in our motion. The citation is 571 F.3d  
25 1048. "The belated disclosure of Brady material

1 tends to throw existing strategies and trial  
2 presentation into disarray. It becomes difficult to  
3 assimilate new information, however favorable, when  
4 a trial already has been prepared on the basis of  
5 the best opportunities and choices available."

6 The Court went on, "It is not hard to  
7 imagine the many circumstances in which the belated  
8 revelation of Brady material might meaningfully  
9 alter a defendant's choices before and during trial:  
10 How to apportion time and resources to various  
11 theories when investigating the case, whether the  
12 defendant should testify, whether to focus the  
13 jury's attention on this or that defense, and so on.  
14 To force the defendant to bear these costs without  
15 recourse would offend the notion of fair trial that  
16 underlies the Brady principle."

17 That quotation is on page 1054, just to  
18 get that out of the way, Your Honor.

19 In regard to the last two exhibits we  
20 tendered today, Exhibits F and G, I want to draw the  
21 Court's attention to a couple of things in  
22 Defendant's Exhibit F. Agent Acee decided post  
23 trial the date that this recording was made was on  
24 April 4, 2018. Agent Acee decided to call Joe  
25 Martinez, also known as Cheech, who was supposed to

1 have passed the paperwork to David Calbert. I don't  
2 know if the Court remembers, but David Calbert  
3 testified at trial that Cheech came out with a  
4 three-man escort and passed the paperwork through a  
5 fence while the guards were watching. And --

6 THE COURT: And we're five days before  
7 trial; right?

8 MS. BHALLA: This interview took place  
9 after trial. This is new evidence. This is  
10 evidence that no one had until after the trial. The  
11 recording did not take place until after trial had  
12 concluded, Your Honor. And I think it's important  
13 to note for two reasons. One, Agent Acee clearly is  
14 still conducting an investigation about the  
15 paperwork and wondering, himself, what happened,  
16 which makes me wonder whether or not the agents  
17 believed the testimony that was produced.

18 THE COURT: Well, even if they didn't  
19 believe it, what does that do? I mean, if it's done  
20 between the two trials, what do we do with it? I  
21 mean, it's new evidence, isn't it?

22 MS. BHALLA: It is, but it's new  
23 evidence --

24 THE COURT: It's not really Brady  
25 information. It was turned over, but --

1 MS. BHALLA: It's new evidence that tends  
2 to shed light on the testimony that occurred at  
3 trial.

4 THE COURT: So is it really a Brady  
5 motion?

6 MS. BHALLA: This is not part of the Brady  
7 allegation, Your Honor. There are Brady allegations  
8 I kind of wanted to address in terms of -- the  
9 reason that I read to you the quotation about late  
10 Brady disclosures was a little bit in response to a  
11 question the Court posed in the previous motion that  
12 I was sort of planning on having to address today  
13 with some of the other evidence.

14 We are arguing Brady violations, Your  
15 Honor, but I wanted to deal with this new evidence  
16 issue first, and then go into the Brady violation.  
17 But I didn't want to neglect to give the Court that  
18 citation, because it struck me when the Court asked  
19 that question, and I didn't want to forget it, Your  
20 Honor. So it's a little bit out of turn, if that's  
21 all right.

22 THE COURT: Certainly.

23 MS. BHALLA: Okay. What's interesting is  
24 that if you look at pages 3 and 4 of the transcript,  
25 Your Honor, Agent Acee kind of brings up the

1 paperwork and what happened with David Calbert and  
2 how he had cooperated. And he says to -- Agent Acee  
3 says to him, "I'm being told it sounds like you  
4 might have passed a couple of pieces over to  
5 Spider." Agent Acee says, "We've talked about it  
6 before," meaning the paperwork, "and I don't know if  
7 you even knew what the papers were or if you were  
8 threatened to do it or what the circumstances were.  
9 But let me say this, Joe," and then they go on to  
10 talk about whether or not he needs an attorney and a  
11 Kastigar letter to talk about the paperwork and to  
12 talk about the issues.

13           And what struck me about this was, one,  
14 that clearly Joe Martinez had given a different  
15 variation of what happened with this paperwork  
16 before; right? And I don't remember reading a 302  
17 about that or seeing a 302 about it, or anything of  
18 that nature. And so I contacted the Government, and  
19 I actually contacted Agent Acee, too, and I asked  
20 them: Where are the previous conversations  
21 mentioned in this transcript with Joe Martinez about  
22 the paperwork in this case? If there were previous  
23 conversations, we need to know about them.

24           And we weren't able to find it, and  
25 there's a reason we weren't able to find it, because

1 it was heavily redacted, and it was produced right  
2 before trial, and that's Defendant's Exhibit G. And  
3 what I noticed is that Joe Martinez' name has been  
4 fully redacted from this document. So there was no  
5 way that the defense teams could have known that  
6 Agent Acee had spoken to Joe Martinez about the  
7 paperwork because his name is not in the 302.

8 What was also interesting is that -- and  
9 I'll admit that I got this today, so I haven't spent  
10 the time reading it that I would like to have. But  
11 nowhere in here is there a discussion about the  
12 paperwork in the Molina murder. There is a  
13 discussion about other paperwork and about some  
14 other parts of their investigation. And there is  
15 some history. But there is nothing in here about a  
16 completely different story about how the paperwork  
17 was passed.

18 And I think, Your Honor, not having this  
19 information, the fact that this 302 is incomplete,  
20 the fact that this 302 doesn't encompass that  
21 information is a problem.

22 If you continue on in Defendant's Exhibit  
23 F and you get towards the end of the transcript,  
24 Your Honor, if you go to pages 13 and 14, here is  
25 what Agent Acee learns from Mr. Martinez, according



1 to them, from the second time. And I don't know why  
2 Spider is insinuating or saying, "I handed him" --  
3 excuse my language, but I'm going to read from  
4 this -- "he's fucking stupid. I didn't do that. I  
5 didn't. I didn't. I never had that kind of  
6 opportunity to do. Because when they take you out  
7 of the cell, you don't come out with no paperwork.  
8 They strip you. You go to the cage and they strip  
9 you. There is no way in hell that I could have  
10 passed him paperwork."

11 And it goes on. And when you get to page  
12 15, he says, "They're out there. They're on a trip.  
13 If I'm going to go take this fucker down, I'm going  
14 to take this fucker down, and they're grasping for  
15 straws."

16 And basically, what he's saying to Agent  
17 Acee there is that they're willing to say whatever  
18 they want about whoever they want to get themselves  
19 out of trouble and they're going to take down people  
20 that they don't like with them.

21 And when you compare this, Your Honor --  
22 when you compare Defendant's Exhibit F to  
23 Defendant's Exhibit G, you'll see that none of this  
24 information -- which apparently is a second  
25 conversation they're having about this -- is

1 included in this 302. And I think that had that  
2 information been included, it would have been -- it  
3 is material and I think it's exculpatory, because it  
4 shows that the Government's theory of how the  
5 paperwork was passed couldn't have happened.

6 And what I anticipate the Court to hear  
7 next is that Mr. Lowry is going to introduce some  
8 exhibits showing location histories, Your Honor.  
9 Joe Martinez was never in the facility at the time  
10 to provide that paperwork to David Calbert when  
11 David Calbert says that paperwork was passed. So  
12 you're going to hear additional evidence from Mr.  
13 Lowry that further supports and corroborates the  
14 assertions that Joe Martinez is making in this  
15 interview post trial with Agent Acee. And  
16 apparently, this conversation happened in December  
17 of 2016, but the 302 regarding that conversation was  
18 so heavily redacted that no one could read it and  
19 know who they were interviewing. And the facts  
20 included in the second conversation, which clearly  
21 states by Agent Acee they've had this conversation  
22 before, is not included in this 302. That would  
23 have led to us trying to find, interview, and  
24 subpoena Mr. Martinez for trial, and it probably  
25 would have led to a further investigation about how

1 it would not have been possible for the paperwork to  
2 have been passed by Joe Martinez to David Calbert,  
3 and it certainly would have been extremely useful  
4 for the impeachment of David Calbert in his  
5 testimony at trial.

6 Those were the first two major exhibits  
7 that I wanted to talk about, Your Honor, and then  
8 I'll move on, unless the Court has any questions  
9 about those exhibits.

10 THE COURT: Not at the present time.

11 MS. BHALLA: Thank you, Your Honor. The  
12 first exhibit that I wanted to talk about, Your  
13 Honor, is Exhibit A. This is a letter from  
14 Mrs. Martinez to Mr. Martinez found in Mario  
15 Rodriguez's property. And it's true that there was  
16 some evidence that Jerry Montoya and some others  
17 were -- and one other; I can't remember who it is.

18 THE COURT: Can you think of -- I was  
19 thinking last night and this morning about that  
20 letter. Can you think of any way that letter would  
21 have been itself admissible?

22 MS. BHALLA: Which one?

23 THE COURT: The letter from Ms. Martinez  
24 to Mr. Martinez.

25 MS. BHALLA: Yes, I would have called

1 Mrs. Martinez to testify about it, and we could have  
2 asked Mr. Martinez about it, had it been produced  
3 prior to trial.

4 THE COURT: Okay. But would you agree  
5 with me that the letter itself probably would never  
6 get into evidence? I couldn't think of a way that  
7 it would come in itself.

8 MS. BHALLA: I do. I think it goes to  
9 common plan or scheme, to state of mind, to motive  
10 and intent.

11 THE COURT: But that's her letter.

12 MS. BHALLA: Yeah. I think that we would  
13 have -- this is how I think it would have gone  
14 differently. Had we had -- this letter was  
15 produced, Your Honor, at the end of trial,  
16 February --

17 THE COURT: I'm not yet asking about what  
18 you would have done differently. I'm just trying to  
19 think through that letter itself. I couldn't think  
20 of a way --

21 MS. BHALLA: You mean to authenticate it?

22 THE COURT: Not to authenticate it, but  
23 that it would come in for the truth of the matters  
24 that are being asserted, and how it would come in  
25 over any sort of hearsay objection.

1 MS. BHALLA: Well, it certainly could come  
2 in as impeachment.

3 THE COURT: Well, that's true. But then  
4 that limits considerably the value of this letter if  
5 it's only going to be used for impeachment of who.  
6 She's going to have to be called at trial, and now  
7 you're talking about it being -- impeaching a  
8 spouse. We're getting kind of removed from the core  
9 issues here.

10 MS. BHALLA: I don't know that we are,  
11 Your Honor. I mean, I understand -- I do take the  
12 Court's point, but what you've got is, you've got an  
13 outside person helping facilitate the exchange of  
14 fraudulent information to concoct a broad scheme  
15 lie, so that other defendants could avoid  
16 consequences, some of whom were the Government's key  
17 witnesses.

18 THE COURT: But wasn't it clear that at  
19 the first trial -- wasn't it pretty clear that  
20 people were concocting stories in that state trial?  
21 That came across, I thought, pretty loud and clear  
22 that if they had had that trial, people were not  
23 going to be telling the truth in it.

24 MS. BHALLA: I think that that's true for  
25 Jerry Armenta and Jerry Montoya. That evidence was

1 not presented as to Timothy Martinez and Mario  
2 Rodriguez. And I think what happens, Your Honor, is  
3 that it takes a lie between two people and broadens  
4 it to a much larger conspiracy. And I think that  
5 that could have been very powerful evidence for the  
6 jury to consider. It wasn't just two guys in the  
7 same facility communicating with each other's  
8 lawyers. You've got them involving third parties  
9 from outside the prison system telling them, "Hey,  
10 guys, your stories aren't matching up." And it  
11 involves Mario Rodriguez and it involves Timothy  
12 Martinez, who had not been implicated in those other  
13 letters. And I think it becomes a much larger, more  
14 dominant problem than it did by limiting it to just  
15 Jerry Armenta and Jerry Montoya. And I would also  
16 argue if the Court is going towards any kind of  
17 spousal privilege --

18 THE COURT: I wasn't going so much to  
19 that. It was just that we're beginning to move kind  
20 of two and three people away from the core issues  
21 here of whether there were SNM folks in that first  
22 trial that were trying to fool the state people and  
23 potentially a state jury.

24 MS. BHALLA: And I think there was  
25 evidence presented that Jerry Armenta and Jerry

1 Armenta did that. That evidence was not presented  
2 as it went to Mario Rodriguez, Timothy Martinez, and  
3 his wife. And I think it just creates a much more  
4 pervasive problem and picture for the jury of the  
5 scope of how these people are really able to  
6 communicate and how they're able to work together.

7 THE COURT: So if you had had it, what  
8 would you tell that jury that you didn't tell the  
9 jury about that state case?

10 MS. BHALLA: I would have definitely spent  
11 a lot more time weaving that into every  
12 cross-examination and into our opening statement.  
13 And I didn't get the opportunity to do that. I also  
14 would have taken the time to attempt to interview  
15 Mrs. Martinez and to find out if we could get any  
16 other communications between her and the other  
17 defendants by way of IPRAs. There are other ways we  
18 could have investigated these issues that we didn't  
19 get to investigate, Your Honor.

20 THE COURT: This is the question I asked  
21 of Ms. Jacks, as well, about her, that late  
22 disclosure in the first trial. Why didn't you --  
23 once you got this box of documents about Mr.  
24 Rodriguez, why didn't you then do what you needed to  
25 do here?

1 MS. BHALLA: I like what Ms. Jacks said  
2 about it, Your Honor, and I tried to articulate that  
3 in our reply. It's impossible, in my mind, to sit  
4 down and assimilate thousands of pages of  
5 information given to you during trial and figure out  
6 how to weave that back into your trial strategy at  
7 the last minute by recalling Government witnesses  
8 when that information was withheld. And that's why  
9 I cited that Burke case, Your Honor. And I'll read  
10 it again. "It becomes difficult to assimilate new  
11 information when a trial has already been prepared  
12 on the basis of the best opportunities and choices  
13 available."

14 It was so chaotic, Your Honor, to try and  
15 process the amounts of discovery. You know, I think  
16 it's a mistake to isolate the disclosures into  
17 discrete groups. The fact is that the total number  
18 of discovery that we were provided with pretrial was  
19 6,282 pages, and most of those productions were in  
20 multiple thousands of pages. It's not like we got  
21 ten pages a day and we were told to review it.  
22 You're trying to assimilate this new information,  
23 reevaluate how to handle witnesses that have already  
24 been called after you've been in litigation for five  
25 weeks and pretrial motions for months and months.



1           And I think it affected more than just --  
2   I mean, I think it just goes to trial strategy and  
3   allowing the Government to benefit by withholding  
4   such information during trial seems to me the wrong  
5   sort of message to send about discovery practices,  
6   Your Honor.

7           THE COURT: All right.

8           MS. BHALLA: I'll move on to our Exhibit  
9   B. I think my argument with Exhibit B is the same  
10   as it pertains to Exhibit A. But here, you know,  
11   the Government's theory of the case is that these  
12   gentleman received paperwork and were told what to  
13   do with it. In this letter, Mr. Rodriguez is  
14   actively seeking out paperwork on other defendants  
15   from the county clerk and misrepresenting how and  
16   why he's doing so. We didn't get this disclosure  
17   until February 28 of 2018.

18           I want to move to Exhibit C now, Your  
19   Honor, and let me just refresh my memory on this  
20   exhibit. I apologize. That is a note from Agent  
21   Stemo, Your Honor, that was produced on March 2 of  
22   2018. And again, I think this is exculpatory  
23   information as it pertains to Mr. Herrera, because  
24   Timothy Martinez indicated that he didn't know how  
25   Carlos was involved in the murder, but that he

1 didn't get along with Carlos, he didn't like him,  
2 essentially.

3 And I think it's important, when you  
4 review this note from Agent Stemo, that you review  
5 it while also reviewing Exhibit D, which is the  
6 questionnaire that was disclosed to us on January  
7 30. And I'd like to point out that this is the only  
8 questionnaire that the defense was provided. It  
9 seems to me that the other ones were provided in  
10 Trial 2.

11 And I think that I took a lot of time to  
12 explain why this was relevant in the brief, but I  
13 just want to highlight to the Court that I think you  
14 have to look at these exhibits together, because  
15 when you look at the questionnaire that was  
16 presented to the SNM defendants and cooperators in  
17 this case, they give the names of the individuals  
18 that they believe to be involved in the murder, and  
19 that, as far as it concerns Mr. Herrera, starts on  
20 page 6, Bates No. 51501. And it sort of makes sense  
21 when you look at the interview notes, Oh, yeah, I  
22 see that, but I don't know how.

23 They're selling -- they're basically  
24 telling the cooperators who their targets are. And  
25 these are targets that have already conspired to lie

1 together in a state case. And I think that's pretty  
2 powerful information that we could have put before  
3 the jury when you tie all those knots together, Your  
4 Honor, when you lace it up, if you will.

5 Here we've got -- when trial started, we  
6 only had two defendants that we had evidence about  
7 lying about what happened; right? Now we have  
8 evidence of four, or actually five, that we didn't  
9 have before trial. And now we have the  
10 questionnaire that shows exactly how and why these  
11 informants had our clients' names involved in the  
12 different murders that were being investigated.

13 I mean, it's sort of like, "I want you to  
14 tell me a story about Jimmie falling down the  
15 mountain."

16 "Okay. Sure. I can do that."

17 But if you go and say, "Do you know what  
18 happened on the mountaintop," they may not have any  
19 information. And I sort of feel like you have to  
20 look at all of this together in a totality of the  
21 circumstances, Your Honor. When you start looking  
22 at all of the evidence withheld and how it all works  
23 in place together, I think it becomes obvious how  
24 the trial strategy could have been wildly different  
25 and produced a very different result.

1           And that's what I'm asking the Court to  
2 do. And I think, Your Honor, that explains why it's  
3 so hard to do that in the middle of trial, to pull  
4 all these pieces together and to take all these  
5 threads, and then try to recall witnesses without  
6 having the time to assimilate this information into  
7 a real working theory of the case. It's one thing  
8 to read a chapter at a time. It's another to sit  
9 down and read a novel. And we were being given such  
10 voluminous information that it was impossible to  
11 process it in a cohesive way, and that's why, when  
12 you look at these two exhibits together, I think it  
13 makes a little more sense, Your Honor.

14           The last exhibit that I wanted to talk  
15 about was Defendant's Exhibit E. And this is  
16 another sort of -- it may seem minor, Your Honor,  
17 but to me it's not. If you recall, during trial  
18 Billy Cordova testified that he helped give another  
19 SNM member a hotshot and they wrapped his body up in  
20 a tarp and left it at a church. The Government  
21 followed up on this, and they generated a 302 on  
22 June 25 of 2018, and they investigated that  
23 allegation, and what they found is that that  
24 allegation didn't have any support from the members  
25 of the church and from the pastor who would have

1 information about that.

2 And I think it's interesting, if  
3 Mr. Cordova was willing to make up information about  
4 himself just to curry favor or to make himself look  
5 more important, what else would he be willing to lie  
6 about? I mean, to make up a story about a murder  
7 that there is no evidence to support based on the  
8 FBI's investigation, just to enhance your story or  
9 to enhance your reputation, can really cause serious  
10 doubt about whether or not that witness was really  
11 telling the truth. And I liked Mrs. Jacks' briefing  
12 about the role of the Court as --

13 THE COURT: Let's do this. I don't want  
14 to rush you, and I've got some questions on this.  
15 Would this be a good time for me to let Ms. Bean  
16 rest her fingers?

17 MS. BHALLA: Sure. And I'm close to  
18 finishing, too, Your Honor.

19 THE COURT: I don't want to rush you.  
20 I've got some questions about this, because of the  
21 timing of this 302. So let's take about a 15-minute  
22 break and I'll let you continue.

23 (The Court stood in recess.)

24 THE COURT: All right. I think we have  
25 all the defendants, an attorney for each of the

1 defendants. All right. We'll go back on the  
2 record. I think we have an attorney for each  
3 defendant.

4 Ms. Bhalla, if you wish to continue your  
5 argument in support of your motion, you may  
6 continue.

7 MS. BHALLA: I think I'm ready to take  
8 questions from the Court, Your Honor.

9 THE COURT: Well, I don't have any at the  
10 present time, other than the timing of that last  
11 disclosure. It came -- again, it came after the  
12 trial.

13 MS. BHALLA: It did, Your Honor.

14 THE COURT: So what do I do with that?  
15 That's almost like evidence that occurred after the  
16 trial.

17 MS. BHALLA: It did, Your Honor. And I  
18 tried to, in my brief, distinguish the standards  
19 between when what happened when new evidence is  
20 presented and also what happens when there are Brady  
21 violations, and to articulate why the disclosures  
22 made during trial were Brady violations and why the  
23 disclosures post trial were relevant. But I think,  
24 case law aside, I think that --

25 THE COURT: It seems to me that we could

1 have spent about two months impeaching Mr. Cordova;  
2 right?

3 MS. BHALLA: That's a dangerous question,  
4 Your Honor.

5 THE COURT: So I mean, you know, the fact  
6 that you may have another lie, I guess this seems to  
7 me to be maybe the definition of "cumulative" with  
8 Mr. Cordova, one more, and we don't have to have a  
9 lie. It's just there as an inconsistent, perhaps,  
10 statement.

11 MS. BHALLA: I think, Your Honor, that to  
12 some extent I understand the Court's perspective.  
13 But I would also point out that there are different  
14 kinds of lies. And lies can mean different things  
15 to juries. And taking credit for a murder that you  
16 didn't commit just to curry favor with the  
17 Government is the kind of lie that would have been  
18 highly probative and highly (unintelligible). It's  
19 definitely something that we would bring out in  
20 another trial.

21 And I think that when you look at this  
22 kind of disclosure -- again, Your Honor, I think  
23 it's a mistake to look at them individually. I  
24 really think that you have to put them all together.  
25 Because when you put them all together, you see that

1 there could have been a very different defense and  
2 there could have been a very different approach to  
3 how we handled the informants.

4 And I want to remind the Court that all of  
5 these convictions rest solely upon the testimony of  
6 these cooperators. And so every piece of  
7 impeachment is very important when that's the case,  
8 and so -- especially when you have evidence that the  
9 cooperators were all working together.

10 So I would just ask the Court to keep that  
11 in mind, Your Honor, when reviewing these exhibits  
12 and when looking at the evidence that we presented  
13 argument about, to do it in a totality of the  
14 circumstances fashion.

15 THE COURT: All right, I will.

16 MS. BHALLA: Thank you, Your Honor.

17 THE COURT: All right. Thank you, Ms.  
18 Bhalla.

19 Ms. Jacks, you specifically joined on  
20 behalf of Mr. Sanchez. Do you have anything you  
21 want to say on this motion?

22 MS. JACKS: I do not.

23 THE COURT: Any other defendant wish to  
24 comment on this?

25 Not seeing any, Mr. Castellano, are you



1 going to respond?

2 MR. CASTELLANO: Yes, Your Honor. Thank  
3 you.

4 I want to start where Ms. Bhalla left off.  
5 She stated that all of the cooperators were working  
6 together. But there was never any evidence at trial  
7 that they were working together. That was a defense  
8 theory, and clearly there were times when  
9 cooperators were housed together. I can say between  
10 both trials, the only time there was evidence of one  
11 cooperator talking to another was Trial 2, when Ben  
12 Clark made a statement to Ruben Hernandez; Ruben  
13 Hernandez testified at trial that Ben Clark asked  
14 him if he remembered something about the paperwork  
15 that Kyle Dwyer brought. Ruben Hernandez said he  
16 didn't remember that, and he testified to that. And  
17 that's the only evidence in either Trial 1 or 2  
18 where there was indication that one cooperator  
19 discussed the case with another one. That's a  
20 defense theory, but there was never proof at trial  
21 that they had actually worked together.

22 Starting with the transcript of Joe  
23 Martinez, I think it's important to note that on  
24 page 1 of the transcript, Agent Acee actually isn't  
25 calling Joe Martinez. Joe Martinez is calling Agent

1 Acee. On the first page, Agent Acee is saying,  
2 "Hello," and Mr. Martinez is saying, "Hello, Bryan."  
3 So actually Joe Martinez is calling Agent Acee.

4 On page 15 of that exhibit, which is a  
5 transcript between Joe Martinez and Agent Acee, I'm  
6 showing the Court page 8 of that exhibit and I'm  
7 indicating on the fifth box from the top there is  
8 actually an admission by Joe Martinez that he was at  
9 the facility the same time that they were. He says  
10 he already knows what Calbert is going to say and he  
11 says, "That's when we were all there."

12 And so once again, there is admission by  
13 Joe Martinez. I know a couple of the defendants  
14 have alleged there is no corroboration of this. But  
15 Joe Martinez himself admits that he was at the same  
16 facility at the same time as Mr. Calbert. So that  
17 actually weighs against the arguments about the  
18 possibility that they were at the same place at the  
19 same time. So I wanted to highlight that.

20 The other thing about Joe Martinez is that  
21 he was actually somebody who was disclosed as a CI  
22 to the defense. I don't remember when that  
23 happened, but I know his name came up in court, and  
24 the defense can correct me if I'm wrong. It came up  
25 in court. I think it may have been

1 Ms. Harbour-Valdez who actually interviewed Mr.  
2 Martinez. I know that she was Trial 2, not Trial 1,  
3 but Mr. Martinez was disclosed to the defense in one  
4 of the hearings where we had to disclose CIs who  
5 were masked by redactions, but he was -- his name  
6 was given.

7           The other thing about the letter from Tim  
8 Martinez's wife. I think the date indicates that  
9 the letter was sent before this case was indicted.  
10 It was a letter when the case was still pending in  
11 state court. And so the indication that -- the only  
12 thing that happened here is that Defendant's Exhibit  
13 A -- I can tell the Court at least on that document,  
14 which is part of the packet, the date was October  
15 23, 2015. So once again, this was old information  
16 from when the case was a state case, and all of  
17 those defendants were impeached at length about the  
18 fact that they were going to commit a fraud on the  
19 Court. So that's the first part of that.

20           The next is that, if I'm not mistaken --  
21 the defense can correct me again -- I remember that  
22 Timothy Martinez's wife was subpoenaed and was  
23 waiting out in the foyer and had refused to testify.  
24 And I think there was an allegation that they were  
25 keeping her until she would cooperate. She

1 ultimately did not agree to cooperate, and she was  
2 released from the subpoena. My recollection -- I  
3 can be corrected -- is that Ms. Martinez was  
4 subpoenaed, they made attempts to get her on the  
5 stand, but she refused.

6 And so once again, it makes that document  
7 even more difficult to introduce for evidentiary  
8 reasons.

9 I want to turn to Defendant's D. I do  
10 have one more exhibit to introduce. It's sworn  
11 testimony by Agent Acee and I can show it to Ms.  
12 Bhalla. In Trial 2, Agent Acee was asked about the  
13 questionnaires and he indicated that he didn't  
14 recall actually giving the questionnaire to anybody  
15 except for one cooperator, and that was Frederico  
16 Munoz, because there were certain time constraints.  
17 So the questionnaire -- there is testimony, not in  
18 Trial 1 but in Trial 2, that Agent Acee was asked  
19 about it. He also testified that the questionnaire  
20 was for the agents because there had been some  
21 mistakes in the 302s about which participants were  
22 involved in which crimes, and that was used as a  
23 tool so that the agents could use that to question  
24 people without making mistakes.

25 And so I'll mark this as an exhibit. It's

1 Agent Acee's testimony from Trial 2, just to be  
2 clear, and I believe it was testimony from April 16,  
3 2018. I want to be clear that the questionnaire was  
4 not given to cooperators. It was given to agents  
5 for the purpose of questioning them. And am I on  
6 Exhibit 5, Your Honor?

7 THE CLERK: Yes.

8 THE COURT: Ms. Bevel is saying yes. I'd  
9 have to look back to make certain, but...

10 MR. CASTELLANO: And I'll show the  
11 transcript to Ms. Bhalla, the portion I have. But  
12 there is an indication from that -- that's a sworn  
13 statement by Agent Acee at a trial that that was not  
14 given to everybody, so therefore, they weren't  
15 suggested. Now, how agents have questioned people  
16 might have varied from time to time, and that would  
17 be a question regarding every single 302, how the  
18 interview was conducted. At this time I move the  
19 admission of Government's 5.

20 THE COURT: Ms. Bhalla, any objection to  
21 Government's Exhibit 5 for your hearing on your  
22 motion?

23 MS. BHALLA: No, Your Honor. I'm just --  
24 there is no objection. I'm just trying to review it  
25 so I understand what it says before I reply.

1 THE COURT: Any of the other defendants  
2 have any objection?

3 Not seeing or hearing any, Government's  
4 Exhibit 5 will be admitted into evidence.

5 (Government Exhibit 5 admitted.)

6 MR. CASTELLANO: Also on the  
7 questionnaire, which is Defendant's D, that was  
8 disclosed for trial. I don't want to go through the  
9 whole thing, but I will note on question 144, page 8  
10 of that exhibit, there is a question: Why did  
11 Daniel Sanchez conspire to murder Anthony Ray Baca?  
12 The response was, "Not aware."

13 So there were times that even if we say  
14 there was a certain answer that was prompted by  
15 agents asking these questions, there is at least one  
16 example where the witness, in this case Mario  
17 Rodriguez, said, "I don't know. I wasn't aware of  
18 that."

19 So it's not clear in any way that just  
20 because these questionnaires existed that they  
21 necessarily suggested the answer to any of those  
22 questions.

23 Looking at Exhibit E, what is correct is  
24 that Exhibit E doesn't tell us anything one way or  
25 the other. This is the exhibit in which agents were

1 sent to the church to ask about any bodies found at  
2 the church. It relates to Billy Cordova. And what  
3 it tells us is that two people at the church didn't  
4 know anything about the body. So it doesn't tell us  
5 he was lying, it doesn't tell us he was being  
6 truthful. It just tells us that two people don't  
7 know anything about a body that was found there.

8 The timing is also interesting, because  
9 the pastor on the March 1st paragraph of that  
10 exhibit indicates that the church was purchased in  
11 December of 2004 and didn't move in until several  
12 months later. So it may have been that none of  
13 those people discovered the body because they  
14 weren't there. The alleged murder happened in 2005,  
15 by Billy Cordova's admission.

16 And the other thing about this exhibit is  
17 that, as I stated in my brief, it's a lot more  
18 damaging to impeach Billy Cordova with a murder for  
19 which he isn't being prosecuted than it is to allege  
20 that he's lying about a murder. And so I think they  
21 got better impeachment out of that line of testimony  
22 than they would have by claiming he was lying about  
23 his participation in a murder.

24 Your Honor, I really don't have anything  
25 to add than I responded in the briefing. So if the

1 Court has questions, I don't think I have anything  
2 further.

3 THE COURT: Well, do you want to comment  
4 on Ms. Bhalla's sort of final point there, her  
5 cumulative point?

6 MR. CASTELLANO: Well, I think if we look  
7 at each of these individually, there would be no  
8 error. And to put them all together to say there is  
9 sufficient error to undermine the verdict or to  
10 grant a new trial, I think it just isn't there.

11 And I'm glad you asked me a question,  
12 because I forgot to make the record that Ms. Bhalla  
13 has withdrawn one of her arguments, which was  
14 ineffective assistance of counsel. So I want to  
15 make sure we make that clear for the record.

16 THE COURT: Is that the one that's built  
17 on the fact that Mr. Davis got disqualified and then  
18 she had to take over, and then we appointed new  
19 counsel?

20 MR. CASTELLANO: That's correct, Your  
21 Honor. So I wanted to make clear that she has  
22 withdrawn that portion of her argument.

23 THE COURT: I didn't think she was quite  
24 arguing that she was ineffective. She was arguing  
25 that she didn't have enough time to prepare, was I



1 thought precisely her argument.

2 MR. CASTELLANO: And I didn't think she  
3 was effective -- ineffective. I'll say that again.  
4 I don't think she was ineffective. But I think she  
5 did a fine job at trial defending her client. She  
6 said there was no -- it was strictly cooperator  
7 testimony in this case. But as to her client, there  
8 were recordings, as well. So certainly there was  
9 corroboration and other hard evidence regarding Mr.  
10 Herrera.

11 One of her arguments related to the  
12 evidence was the discovery, and that's why I  
13 attached the discovery letters for the Court to see.  
14 What the Court will see is that, according to the  
15 defense, 3,000 pages were disclosed at the very  
16 beginning of trial, so half of the disclosures were  
17 made. We're not saying it was a small amount of  
18 discovery, but it was disclosed at the beginning of  
19 trial, giving them, the defense team, with a joint  
20 defense agreement and a joint defense with  
21 resources, time to use those documents. And I think  
22 if the Court looks at the discovery letters, the  
23 Court will see many of these documents were used at  
24 trial by both sides, and it included some of the  
25 prison records, locations, histories, and things of

1 that nature.

2 Some of the discovery is also related to  
3 Trial 2, because we had ongoing discovery  
4 obligations. So those disclosures had no bearing on  
5 this trial at all. So that's why I made those  
6 available to the Court and two responses.

7 But I don't think there's cumulative  
8 error, going back to the Court's question, if none  
9 of these really amounts to error. And I don't think  
10 the evidence in this case establishes that there  
11 was.

12 What I will add is, one of those alleged  
13 errors was the Mario Rodriguez letter, which was  
14 found in his property. I've introduced that now in  
15 two of these hearings, and it's clear now that the  
16 document which seemed to carry the greatest weight  
17 for purposes of impeachment and any allegation of  
18 wrongdoing by the Government was introduced two  
19 weeks prior in a defense pleading. So I want to  
20 make that part of the record, as well. That would  
21 not be part of any prejudice to the defense.

22 Other than that, Your Honor, the United  
23 States would rely on its briefing in this matter.

24 THE COURT: All right. Thank you,  
25 Mr. Castellano.

1 Any other defendant want to speak before  
2 Ms. Bhalla gets the last word?

3 All right, Ms. Bhalla. Do you wish to  
4 speak on your motion?

5 MS. BHALLA: Thank you, Your Honor.  
6 Briefly.

7 THE COURT: And Mr. Castellano is correct  
8 that you have withdrawn the -- you didn't have  
9 enough time to prepare, that first portion of your  
10 motion?

11 MS. BHALLA: That's correct, Your Honor.  
12 And I'd like for the Court to actually review that  
13 portion of our reply explaining why we withdrew that  
14 motion, because I think that that thought process is  
15 informative for the Court and relevant to the  
16 discovery violations which we had to deal with  
17 during trial.

18 But I wanted to go very briefly -- and  
19 Mr. Castellano just said there was no evidence that  
20 the cooperators were working together. Well, that's  
21 the problem. I mean, we didn't have that evidence  
22 in time to prepare that.

23 THE COURT: Wasn't that aspect pretty  
24 minimal, pretty minuscule?

25 MS. BHALLA: The aspect that they were

1 working together?

2 THE COURT: Yeah. I mean, I don't  
3 remember, other than the incident that has been  
4 brought out this afternoon -- I don't recall another  
5 incident. Am I not missing or not remembering  
6 others?

7 MS. BHALLA: Let me narrow the question,  
8 Your Honor. Do you mean in terms of discovery that  
9 was produced during trial?

10 THE COURT: Well, I'm talking about  
11 cooperation or people rehearsing their testimony or  
12 anybody talking about it. I thought that was a  
13 fairly minimal problem in trial.

14 MS. BHALLA: I'm talking about the  
15 witnesses working together to fabricate the story  
16 that they were providing to the Government.

17 THE COURT: In the state court case.

18 MS. BHALLA: Yes, but I also think that  
19 you can find evidence of that in other places. But  
20 just so the record is clear, Your Honor, this letter  
21 from -- Exhibit A, this letter from Timothy  
22 Martinez's wife to Timothy Martinez -- that was  
23 something that was disclosed to us; or at least the  
24 only time that I became aware of its disclosure was  
25 on February 28, 2018, when the 934 pages of Mario

1 Rodriguez' property were produced.

2 Now that Mr. Castellano says something  
3 about Mrs. Martinez being here under subpoena, I  
4 sort of vaguely remember that, as well, but it  
5 wasn't for this. Because this happened well -- this  
6 production happened well after Timothy Martinez was  
7 through testifying. So that issue had never been  
8 explored with Mrs. Martinez. I don't know why she  
9 was here. It was for some other purpose, but it had  
10 nothing do with this letter, because I didn't have  
11 it. And I hadn't seen it produced previously.

12 THE COURT: But what else -- I guess I'm  
13 trying to think what else would she have been  
14 hanging around this court about?

15 MS. BHALLA: I'm trying -- it would be  
16 purely speculation on my part, but I --

17 THE COURT: Well, speculate for me,  
18 because --

19 MS. BHALLA: I recall one of the  
20 defense -- maybe it was Mr. Villa wanting to ask her  
21 about a drug case or something. I don't remember  
22 how it was relevant. But I'm pretty certain it had  
23 nothing to do with this letter. I'm willing to  
24 entertain advice or suggestion from my cohorts back  
25 here, but -- or from Ms. Salazar, who has an

1 impeccable memory.

2 Oh, that's right. There was an allegation  
3 that Mr. Martinez was dealing drugs while he was at  
4 Sandoval County Detention Center, and Mrs. Martinez  
5 was facilitating that, that enterprise. And it was  
6 after he had been working as a Government witness,  
7 and it went to his -- you know, it was Giglio  
8 information about his conduct while he was a  
9 cooperating witness. And that does sound correct,  
10 Your Honor.

11 The reference to the transcript, which is  
12 Exhibit F, when he says that Mr. Martinez says,  
13 "Well, that's when we were all there together," I  
14 think he missed the point of what I was saying.  
15 David Calbert testified as to a timeframe when that  
16 paperwork was passed. And according to the  
17 timeframe he provided, Mr. Martinez was not there  
18 and could not have possibly passed the paperwork.  
19 And that was the point of that particular comment.  
20 And I think that Mr. Lowry will clear that up, Your  
21 Honor, so I won't belabor it.

22 Whether or not Mr. Martinez was disclosed  
23 as a CI, the information provided in that 302 was  
24 impossible for us to discern, given the redactions.  
25 Let me just look over my notes, Your Honor.

1 Oh, those letters, the letter being  
2 written, the one we just discussed from Mr.  
3 Martinez' wife, while that's true that the letter  
4 may have been authored in 2015, it wasn't received  
5 until almost the end of trial.

6 I think that I articulated my arguments  
7 about the questionnaire fairly well in the reply,  
8 and I would just say that the exhibits that they  
9 tendered with Agent Acee's testimony about the  
10 questionnaires were about the cooperators in Trial  
11 2. It didn't specify that those were the  
12 cooperators in Trial 1.

13 Other than that, I just ask the Court to  
14 review the briefs. I mean, I certainly didn't cover  
15 everything in oral argument today, but I wanted to  
16 try and bring out the salient points, Your Honor,  
17 and unless you have any other questions, I think I'm  
18 through.

19 THE COURT: All right. Thank you, Ms.  
20 Bhalla.

21 MS. BHALLA: Thank you, Your Honor.

22 THE COURT: Well, I'll certainly take a  
23 closer look at this in light of the evidence that's  
24 been presented. As I read Mr. Herrera's motion and  
25 the joinders in it, nothing jumped out at me that

1 suggested that a new trial was appropriate. It  
2 seemed to me that there was considerable evidence  
3 introduced against him, and that nothing here would  
4 have changed to any significant degree or materially  
5 the strategy in the case and because of the other  
6 evidence that was presented.

7 So I'm inclined to deny the motion both as  
8 to him and the defendants that have joined that  
9 motion. But I'll take a hard look at it, and I'll  
10 give you an opinion on it as soon as I possibly can.

11 All right, Mr. Lowry, I think you're up  
12 next on behalf of Mr. Baca.

13 MR. LOWRY: Thank you, Your Honor.

14 THE COURT: Mr. Lowry.

15 MR. LOWRY: Thank you, Your Honor.

16 THE COURT: Mr. Lowry.

17 MR. LOWRY: Your Honor, just as a matter  
18 of housekeeping, I think I worked out an arrangement  
19 with the United States. I want to follow a bit of  
20 Mr. Castle's example this morning and just present  
21 evidence. And if it's okay with the Court, I'd  
22 prefer to argue on paper afterwards.

23 THE COURT: All right. Do you have  
24 additional evidence to present?

25 MR. LOWRY: I do, Your Honor. And



1 actually, I want to go through a bit of  
2 housekeeping. I talked throughout the day with  
3 Ms. Armijo, and what I believe they've agreed to do  
4 is allow all the exhibits that were attached to the  
5 motions to come in as admitted, with one exception.  
6 In the reply brief, we cited to three Lupe Urquizo  
7 phone calls regarding his ability to view the  
8 tablets. And we had agreed that there would be a  
9 conditional admittance to allow the Government a  
10 chance to review those audiotapes because we had to  
11 lodge them this morning, and to make sure they're  
12 fair and accurate representations of what was  
13 disclosed by the United States in discovery.

14 With that, Your Honor, there are some  
15 additional exhibits, aside from what was on the  
16 pleadings, that we've agreed to introduce as  
17 evidence. And they're largely -- well, there are  
18 two general categories, and one to deal with the  
19 IPRA requests, and some of them are redundant, but  
20 some of them are the emails that went along with  
21 them. And that would be Exhibit W through, I  
22 believe, it's CC. And that's just --

23 THE COURT: These are trial exhibits?

24 MR. LOWRY: No, Your Honor, these would be  
25 new exhibits. They're associated with the exhibits,

1 and I can get you a list. They're associated, and  
2 if you look at Document 2423, we filed an appendix  
3 of exhibits to the motion for a new trial. And they  
4 would go with what has been marked 9 through 14 on  
5 that Document 2423, and those would be Exhibits I  
6 through N on the original motion. And what these  
7 really are are emails to just drill down and shed  
8 more light on the nature of the conversations that  
9 were taking place about the inability of the  
10 Department of Corrections to follow up on the second  
11 request for the recreation yard records, Your Honor.

12 And we do have -- I'm going to call two  
13 witnesses. One, our investigator, Leonor Delgado,  
14 to talk about the line of sight from the recreation  
15 yard into Q-106, the cell, and then we're going to  
16 call Jim Brewster, the general counsel for the  
17 Department of Corrections, to testify about the IPRA  
18 requests and the document destruction that happened  
19 in May of this year.

20 THE COURT: All right.

21 MR. LOWRY: There are two additional  
22 exhibits, and these are marked as Defendant's  
23 Exhibits DD and DE. And DD is the field notes from  
24 Bryan Acee regarding the initial meeting with Lupe  
25 Urquizo before he had counsel present, and the 302

1 associated with that. And Ms. Armijo agreed to  
2 admit these with the provision that she'd be allowed  
3 to augment the record with all of the 302s  
4 concerning the cooperating witness Lupe Urquizo, and  
5 we have no objection to that, Your Honor.

6 THE COURT: All right. So let me get  
7 exactly the ones you're moving. Do you want to move  
8 those by number?

9 MR. LOWRY: Sure. Your Honor, we would  
10 move Exhibit A, which is the November 14, 2017,  
11 audio recording of Mario Rodriguez that was produced  
12 in the summer of 2018.

13 THE COURT: Any objection, Ms. Armijo?

14 MS. ARMIJO: No, Your Honor.

15 THE COURT: Any objection from any other  
16 defendant?

17 All right. So Baca Exhibit A will be  
18 admitted into evidence.

19 (Defendant Baca Exhibit A admitted.)

20 MR. LOWRY: And Exhibit B was a 302 dated  
21 November 6, 2017. It was actually the initial  
22 intake interview with Mario Rodriguez. The actual  
23 interview happened on October 24, 2017. That would  
24 be Defendant's Exhibit B, Your Honor.

25 THE COURT: Any objection, Ms. Armijo?

1 MS. ARMIJO: No, Your Honor.

2 THE COURT: Any other defendant?

3 Not hearing any, Baca Exhibit B will be  
4 admitted into evidence.

5 (Defendant Baca Exhibit 5 admitted.)

6 MR. LOWRY: Your Honor, Exhibit C is Agent  
7 Acee's field notes from that same interview with  
8 Mario Rodriguez.

9 THE COURT: Any objection, Ms. Armijo?

10 MS. ARMIJO: No, Your Honor.

11 THE COURT: Any other defendant?

12 Not hearing or seeing any objection, Baca  
13 Exhibit C will be admitted into evidence.

14 (Defendant Baca Exhibit C admitted.)

15 MR. LOWRY: Your Honor, Exhibit D is the  
16 October 24 letter to Timothy Martinez from his wife  
17 that Ms. Bhalla just discussed at length.

18 THE COURT: All right. Any objection,  
19 Ms. Armijo?

20 MS. ARMIJO: No, Your Honor.

21 THE COURT: Any other defendant?

22 Not seeing or hearing any objection, Baca  
23 Exhibit D will be admitted into evidence.

24 (Defendant Baca Exhibit D admitted.)

25 MR. LOWRY: Your Honor, Exhibit E are just

1 selected pages from Lupe Urquizo's trial testimony  
2 that sort of underscore the points we were making  
3 about the line of sight and the Q-106 and the  
4 timeframe within which that conversation -- not  
5 really a conversation, but that communication took  
6 place.

7 THE COURT: Any objection, Ms. Armijo?

8 MS. ARMIJO: Do we have this entire  
9 transcript in, as well?

10 MR. LOWRY: Your Honor, I think -- thank  
11 you for asking the question, Ms. Armijo.

12 That brings up a broader point that I  
13 believe Ms. Armijo and I had agreed on for the  
14 purpose of drafting the final argument, that both  
15 counsel would be permitted to use all the trial  
16 transcripts and exhibits that were introduced at  
17 trial. And so I think that we would have the  
18 complete trial transcript of Lupe Urquizo to select  
19 from.

20 THE COURT: All right. So if he's just  
21 got a portion, if you want to introduce the  
22 entire -- do you want to do that? And that way I  
23 can focus at least on what Mr. Baca wants me to  
24 focus on, and then I'd have the complete, if you  
25 want to point to other things.

1 MS. ARMIJO: That's fine. I don't have it  
2 right now. I thought --

3 THE COURT: And you don't have any  
4 objection to supplementing it later?

5 MR. LOWRY: No, Your Honor. I thought  
6 that was --

7 THE COURT: Anybody else have any  
8 objection or problem with that arrangement? Baca  
9 Exhibit -- give me the letter again.

10 MR. LOWRY: It was Exhibit E.

11 THE COURT: Baca Exhibit E will be  
12 admitted into evidence.

13 (Defendant Baca Exhibit E admitted.)

14 MR. LOWRY: And Your Honor, Exhibits F, G,  
15 and H are individual still shots depicting the line  
16 of sight between cell North 3A Q-106 and the  
17 recreation yard, and there are different  
18 perspectives. But those three exhibits, again, F,  
19 G, and H, were individual still shots.

20 THE COURT: Any objection, Ms. Armijo?

21 MS. ARMIJO: No, but I would like to have,  
22 for purposes of court hearings, especially if there  
23 are going to be witnesses, if you have a copy of  
24 that, a hard copy, to use for the hearings.

25 MR. LOWRY: I'll look, Your Honor.

1 THE COURT: It would be good for me to  
2 have one, too.

3 MR. LOWRY: What we were going to do with  
4 Ms. Delgado today was do videotapes.

5 THE COURT: Is that all right for the  
6 hearing?

7 MS. ARMIJO: Yes.

8 THE COURT: Any other objection from any  
9 other defendant?

10 Not hearing any, Baca Exhibits F, G, and H  
11 will be admitted into evidence.

12 (Defendant Baca Exhibits F, G, and H  
13 admitted.)

14 MR. LOWRY: And Your Honor, Exhibit I was  
15 just the IPRA request to the Department of  
16 Corrections dated April 17, 2018, for the initial  
17 set of recreation yard records from September 2011  
18 to September 2012.

19 THE COURT: All right. Any objection to  
20 Exhibit I, Ms. Armijo?

21 MS. ARMIJO: No, Your Honor.

22 THE COURT: Any other defendant?

23 Not hearing or seeing any objection, Baca  
24 Exhibit I will be admitted for purposes of his new  
25 trial motion.

1 (Defendant Baca Exhibit I admitted.)

2 MR. LOWRY: And Your Honor, Exhibit J  
3 would be the follow-up IPRA request for the records  
4 at issue here from September 2012 to September 2014.  
5 That's Exhibit J.

6 THE COURT: All right. Any objection,  
7 Ms. Armijo?

8 MS. ARMIJO: No, Your Honor.

9 THE COURT: Any other defendant?

10 Not seeing or hearing any objection, Baca  
11 Exhibit J will be admitted for purposes of his new  
12 trial motion.

13 (Defendant Baca Exhibit J admitted.)

14 MR. LOWRY: Your Honor, Exhibit K was a  
15 May 16, 2018, email correspondence between my office  
16 and the Department of Corrections concerning the May  
17 14 IPRA request.

18 THE COURT: All right. Any objection to  
19 K, Ms. Armijo?

20 MS. ARMIJO: No, Your Honor.

21 THE COURT: Any other defendant?

22 Not seeing or hearing any objection, Baca  
23 Exhibit K will be admitted for purposes of his new  
24 trial hearing.

25



1 (Defendant Baca Exhibit K admitted.)

2 MR. LOWRY: Your Honor, Exhibit L is a  
3 second email on May 17 on the same subject.

4 THE COURT: Any objection to L,  
5 Ms. Armijo?

6 MS. ARMIJO: No, Your Honor.

7 THE COURT: Any other defendant?

8 Not seeing or hearing any objection, Baca  
9 Exhibit L will be admitted into evidence for  
10 purposes of his new trial motion.

11 (Defendant Baca Exhibit L admitted.)

12 MR. LOWRY: Your Honor, Exhibit M is a  
13 September 19, 2018, email between my office and the  
14 Department of Corrections concerning an August 23,  
15 2018, IPRA request concerning the destruction of the  
16 recreation yard records.

17 THE COURT: Any objection, Ms. Armijo?

18 MS. ARMIJO: No, Your Honor.

19 THE COURT: Any other defendant?

20 Not seeing or hearing any, Baca Exhibit M  
21 will be admitted for purposes of his new trial  
22 motion.

23 (Defendant Baca Exhibit M admitted.)

24 MR. LOWRY: Exhibit N is the document  
25 destruction receipt dated May 18, 2018.

1 THE COURT: Any objection, Ms. Armijo?

2 MS. ARMIJO: I'm sorry, what is it?

3 THE COURT: It's N, a document destruction  
4 receipt dated May 18, 2018.

5 MS. ARMIJO: That's fine.

6 THE COURT: Any other defendant?

7 Not seeing or hearing any objection, Baca  
8 Exhibit N will be admitted for purposes of his new  
9 trial motion.

10 (Defendant Baca Exhibit N admitted.)

11 MR. LOWRY: Your Honor, Defendant's  
12 Exhibit -- and these were going to be used for  
13 today's hearing with the witnesses. But actually,  
14 as I look at this, Defendant's Exhibit W is a  
15 duplicate of Exhibit I, the IPRA request, so I don't  
16 know if we just want to strike this W or --

17 THE COURT: Okay. Well, let's just skip  
18 over it. Do you want to -- does that work?

19 MR. LOWRY: Yes.

20 THE COURT: We'll just have a gap in our  
21 letters.

22 MR. LOWRY: And Your Honor, Defendant's  
23 Exhibit X -- you should have it, Maria --  
24 Defendant's Exhibit X is an email between Daniel  
25 Salazar of the New Mexico Corrections Department and

1 Catherine Earl of the New Mexico Corrections  
2 Department regarding the initial recreation yard  
3 records request. That's May 9, 2018.

4 THE COURT: Any objection to X, Ms.  
5 Armijo?

6 MS. ARMIJO: No, Your Honor.

7 THE COURT: Any other defendant?

8 Not seeing or hearing any objection, Baca  
9 Exhibit X will be admitted for purposes of his new  
10 trial motion.

11 (Defendant Baca Exhibit X admitted.)

12 MR. LOWRY: Your Honor, Defendant's  
13 Exhibit Y are three selected pages out of the  
14 initial set of recreation yard records that were  
15 produced by the Department of Corrections on May 10,  
16 2018.

17 THE COURT: Any objection to Exhibit Y,  
18 Ms. Armijo?

19 MS. ARMIJO: If I may just have a moment.

20 THE COURT: You may.

21 MS. ARMIJO: No objection.

22 THE COURT: Any other defendant have any  
23 objection?

24 Not seeing or hearing any objection, Baca  
25 Exhibit Y will be admitted into evidence for

1 purposes of his new trial hearing.

2 (Defendant Baca Exhibit Y admitted.)

3 MR. LOWRY: Your Honor, Defendant's  
4 Exhibit Z is a complete email thread concerning the  
5 May -- pardon me, concerning the second IPRA request  
6 for recreation yard records that was submitted to  
7 the Department of Corrections on May 14, 2018.

8 THE COURT: Any objection to Exhibit Z,  
9 Ms. Armijo?

10 MS. ARMIJO: No, Your Honor.

11 THE COURT: Any other defendant have any  
12 objection?

13 Not seeing or hearing any objection, Baca  
14 Exhibit Z will be admitted into evidence for  
15 purposes of his new trial motion.

16 (Defendant Baca Exhibit Z admitted.)

17 MR. LOWRY: Your Honor, Defendant's  
18 Exhibit AA is an email thread addressing the  
19 Department of Corrections response to the May 14  
20 IPRA request for the September 2012 to September  
21 2014 recreation yard records.

22 THE COURT: Any objection to AA,  
23 Ms. Armijo?

24 MS. ARMIJO: No, Your Honor.

25 THE COURT: Any other defendant have any

1 objection?

2 Not seeing or hearing any objection, Baca  
3 Exhibit AA will be admitted for purposes of his new  
4 trial motion.

5 (Defendant Baca Exhibit AA admitted.)

6 MR. LOWRY: And Exhibit BB is a similar  
7 email thread that ran in parallel with AA concerning  
8 the Department of Corrections response to the May 14  
9 IPRA request.

10 THE COURT: Any objection to Exhibit BB,  
11 Ms. Armijo?

12 MS. ARMIJO: No, Your Honor.

13 THE COURT: Any other defendant have any  
14 objection?

15 Not seeing or hearing any objection, Baca  
16 Exhibit BB will be admitted for purposes of his new  
17 trial motion.

18 (Defendant Baca Exhibit BB admitted.)

19 MR. LOWRY: Your Honor, Defendant's  
20 Exhibit CC is just a complete set of documents  
21 regarding the destruction of the recreation yard  
22 records on May 18, 2018. It's the original receipt  
23 and the transmittal paperwork. It's a two-page  
24 exhibit.

25 THE COURT: Any objection to CC,

1 Ms. Armijo?

2 MS. ARMIJO: No, Your Honor.

3 THE COURT: Any other defendant?

4 Not seeing or hearing any objection, Baca  
5 Exhibit CC will be admitted into evidence.

6 (Defendant Baca Exhibit CC admitted.)

7 MR. LOWRY: And then, Your Honor, Exhibit  
8 DD is the FBI field notes from the initial meeting  
9 between Agent Acee and others and Lupe Urquizo.

10 THE COURT: Any objection to DD,

11 Ms. Armijo?

12 MS. ARMIJO: No, Your Honor.

13 THE COURT: Any other defendant have any  
14 objection?

15 Not seeing or hearing any objection, Baca  
16 Exhibit DD will be admitted into evidence.

17 (Defendant Baca Exhibit DD admitted.)

18 MR. LOWRY: And Your Honor, Defendant's  
19 Exhibit EE is the 302 associated with that same  
20 meeting.

21 THE COURT: Any objection to EE,

22 Ms. Armijo?

23 MS. ARMIJO: No, Your Honor.

24 THE COURT: Any other defendant have any  
25 objection?

1 Not seeing or hearing any objection, Baca  
2 Exhibit EE will be admitted for purposes of his new  
3 trial motion.

4 (Defendant Baca Exhibit EE admitted.)

5 THE COURT: Any others, Mr. Lowry?

6 MR. LOWRY: That's it, Your Honor. And  
7 again, just with the unilateral understanding that  
8 both parties can refer back to the trial transcripts  
9 in toto, as well as the exhibits tendered by both  
10 parties during the trial.

11 THE COURT: All right. Do you have your  
12 first witness, Mr. Lowry?

13 MR. LOWRY: I do, Your Honor. The defense  
14 would like to call Leonor Delgado.

15 THE COURT: Ms. Delgado, if you'll come up  
16 and stand next to the witness box on my right, your  
17 left, before you're seated, my courtroom deputy,  
18 Ms. Bevel, will swear you in.

1 LEONOR DELGADO,  
2 after having been first duly sworn under oath,  
3 was questioned and testified as follows:

4 THE COURT: Ms. Delgado, Mr. Lowry.

5 THE WITNESS: Yes, sir.

6 MR. LOWRY: Thank you, Your Honor.

7 DIRECT EXAMINATION

8 BY MR. LOWRY:

9 Q. Ms. Delgado, will you state and spell your  
10 name for the court reporter, please?

11 A. Leonor Delgado. L-E-O-N-O-R,  
12 D-E-L-G-A-D-O.

13 Q. Ms. Delgado, how are you employed?

14 A. I'm a licensed private investigator in the  
15 state of New Mexico, and I'm employed by the  
16 Rothstein Donatelli law firm.

17 Q. Ms. Delgado, how long have you been an  
18 investigator?

19 A. Off and on since 1997.

20 Q. In your capacity as an investigator, have  
21 you had the opportunity to visit the Level 6  
22 facility at the Penitentiary of New Mexico in  
23 Santa Fe?

24 A. I have.

25 Q. And when was the last time you visited



1 that facility?

2 A. I was there last Thursday. I want to say  
3 it was December 13th.

4 Q. Approximately what time did you arrive at  
5 the facility?

6 A. 11:00 in the morning.

7 Q. And what was the purpose of your visit to  
8 the facility?

9 A. The purpose of my visit was to determine  
10 whether I could see you in Q-106 of the prison  
11 facility while standing in the rec yard.

12 Q. Was there a specific rec yard unit you  
13 were standing in?

14 A. Yes, sir.

15 Q. And which unit was that?

16 A. That was directly across from Building Q.

17 Q. Did that have a number associated with  
18 that?

19 A. Not that I recall.

20 Q. Would it refresh your recollection to show  
21 you one of the videos you shot that morning to  
22 remember the recreation yard number?

23 A. Yes, sir.

24 MR. LOWRY: With the Court's permission,  
25 may I play this video?

1 THE COURT: You may.

2 (Videotape played.)

3 BY MR. LOWRY:

4 Q. Do you recall this video?

5 A. Yes, sir, I do.

6 Q. And who took this video?

7 A. I took the video.

8 Q. Having reviewed that video, do you recall  
9 seeing a number on the door, on the right-hand side  
10 of the door?

11 A. I did not see that in the video, but I did  
12 take it.

13 Q. Let's go back and look at it again. May I  
14 draw your attention to the right-hand side of the  
15 door?

16 A. I see it now. Thank you. It's number 1.

17 Q. Now, how were you going to assess this  
18 line-of-sight project?

19 A. I needed to first establish that that was  
20 the rec yard across from Building Q. You were going  
21 into the cell 106. You were -- wound up indicating  
22 through a guard that you were in the cell, and then  
23 I needed to pan and focus in on that particular  
24 window.

25 Q. Did you use your -- the naked eye in

1 addition to a camera?

2 A. I did.

3 Q. And how could you tell when I was  
4 positioned in Q-106?

5 A. You were escorted by a guard while I was  
6 outside with someone with the administration. Once  
7 you were in the cell, you radioed that you were  
8 in -- the guard radioed that you two were in the  
9 cell.

10 Q. And at that time, were you able to see me  
11 in cell Q-106 from recreation unit 1?

12 A. I was not.

13 Q. What other tools did you use to try to  
14 enhance your vision into Q-106?

15 A. I used the video camera and I used the  
16 focus, the tight-focus lens on it.

17 Q. Using any of those enhancements, were you  
18 ever able to see into cell Q-106 from the recreation  
19 unit 1?

20 A. I was not.

21 Q. And you took additional videos from the  
22 interior of the recreational yard, did you not?

23 A. I did.

24 MR. LOWRY: Your Honor, I burned a compact  
25 disc, two videos, which I've labeled for exhibit

1 purposes Defendant's Exhibit U and Defendant's  
2 Exhibit V, and I'd like at this point to play  
3 Defendant's Exhibit U for Ms. Delgado, if I may.

4 THE COURT: All right. You may.

5 MS. ARMIJO: Just so we're clear, are  
6 these offered? Because I was just handed that right  
7 as she was sitting, so I haven't had a chance to  
8 look at both videos.

9 THE COURT: Are you going to move their  
10 admission?

11 MR. LOWRY: I am, Your Honor. I was going  
12 to ask her to authenticate them as true and accurate  
13 depictions of the video she took last Thursday.

14 THE COURT: All right. Let him lay a  
15 foundation, and we'll see, before you use it, if you  
16 have any objection.

17 All right, Mr. Lowry.

18 BY MR. LOWRY:

19 Q. Mrs. Delgado, can you describe at the  
20 beginning of this what we're looking at?

21 A. We're looking at a wall which is the left  
22 as you enter the area of the cage.

23 Q. And what did you use to take this video?

24 A. A hand-held video camera.

25 Q. And who was operating the camera at all

1 times?

2 A. I was.

3 Q. Okay. I'm going to play this clip. It's  
4 a minute and 16 seconds.

5 (Videotape played).

6 Q. Okay, Ms. Delgado, the whole video clip of  
7 a minute and 16 seconds ran. Do you recognize this  
8 clip?

9 A. I do.

10 Q. How do you recognize that?

11 A. I took that video last Thursday on the  
12 13th at PNM.

13 Q. Does that fairly and accurately describe  
14 the scene as you experienced it last Thursday?

15 A. Yes, it does.

16 MR. LOWRY: Your Honor, at this time I'd  
17 like to move Defendant's Exhibit U in evidence.

18 THE COURT: Any objection, Ms. Armijo?

19 MS. ARMIJO: As long as it's being  
20 admitted for how it appeared last Thursday, no  
21 objection.

22 THE COURT: All right. I can't think it  
23 would be any more. You want me to make an inference  
24 that it was the same. But I'll admit it for being a  
25 tape-recording that was made last week, or a

1 recording that was made last week. All right.

2 Is there any objection from any other  
3 defendant?

4 Not hearing any, Baca Exhibit U will be  
5 admitted into evidence.

6 (Defendant Baca Exhibit U admitted.)

7 BY MR. LOWRY:

8 Q. Ms. Delgado, let me back this up. We're  
9 looking at Defendant's Exhibit U at approximately 32  
10 seconds into the video, and this is a still shot of  
11 it. Can you describe for the Court what we're  
12 looking at here?

13 A. I am in the rec area, looking -- the  
14 camera is pointed through one, two layers of metal  
15 screens facing cell dormitories on the other side.  
16 There are windows, and the windows are covered with  
17 plywood.

18 Q. Now, what housing unit is this that we're  
19 looking at?

20 A. Q.

21 Q. And how could you tell?

22 A. It's indicated in red on the building.

23 Q. And could you tell the Court anything  
24 about the particular windows in terms of what cell  
25 they related to?

1           A.     There are six windows across the bottom,  
2     and each one is covered with plyboard, tilted to the  
3     side, and they're all on the other side of the two  
4     layers of wire mesh.

5           Q.     Now, which window would have been Q-106?

6           A.     It would be the lower level, six windows  
7     from the right.

8           Q.     The right being the right of this  
9     photograph as you look at it?

10          A.     Yes, sir.

11          Q.     So for the Court's edification, this would  
12     be Q-101, that very first piece of plywood we see on  
13     the right-hand side?

14                 MS. ARMIJO: I'm sorry, I can't see. Did  
15     you mark?

16                 MR. LOWRY: No, I didn't. I can't get the  
17     marker up.

18     BY MR. LOWRY:

19          Q.     I apologize that there are no screens  
20     available, but on the right of this is Q-101?

21          A.     Yes.

22          Q.     And the next window over is Q-102?

23          A.     Yes, sir.

24          Q.     And as you pan over, could you tell the  
25     Court where Q-106 would be from that vantage point?

1           A.     It would be beyond what I now know to be a  
2 guard station booth, and it would be right behind  
3 that.

4           Q.     Okay. Were you able to use the windows at  
5 the top to orient where Q-106 would be?

6           A.     I did not use that as a guide, no, sir.

7           Q.     Could you?

8           A.     Yes, sir.

9           Q.     So where on this still shot -- and this is  
10 at 41 seconds into the video -- would Q-106 be?

11          A.     I would -- looking at the screen, to your  
12 left you have one, two, and three support beams.  
13 And it would be in between the second and third  
14 support beams.

15          Q.     Could you actually see the window at all  
16 from that vantage point?

17          A.     I could see the window, yes, sir.

18          Q.     Wait. On this particular still shot, can  
19 you see?

20          A.     No. No, sir, not on this particular shot.

21          Q.     But as you moved throughout the recreation  
22 yard, could you see the window?

23          A.     I could see the window covered with  
24 plywood, yes.

25          Q.     Could you ever see into the room?



1 A. I could not.

2 Q. And could you ever see any human  
3 silhouette inside the room?

4 A. No, sir.

5 MR. LOWRY: And Your Honor, I'm going to  
6 move to the next video clip which, again, is an  
7 equally short clip. And this for identification  
8 purposes will be Defendant's Exhibit V. And this  
9 clip is two minutes and nine seconds.

10 (Videotape played.)

11 Q. And how does this video clip begin?

12 A. It begins with me being in the rec yard.  
13 I am starting from the right side, being the first  
14 window is Q-101, and then panning left.

15 (Videotape played.)

16 Q. Ms. Delgado, in this two-minute-and-nine-  
17 second video, do you recognize that?

18 A. I do.

19 Q. How do you recognize that?

20 A. I took that video on Thursday, December  
21 13th, on a hand-held video.

22 Q. And this fairly and accurately represents  
23 the video that you shot last Thursday at  
24 approximately 11:00 a.m.?

25 A. It does.

1 MR. LOWRY: Your Honor, at this time the  
2 defense would move Exhibit V into evidence.

3 THE COURT: Any objection, Ms. Armijo?

4 MS. ARMIJO: No, none, other than if it's  
5 just representing that sort of day.

6 THE COURT: Well, it does represent. I  
7 think Mr. Lowry wants me to draw the inference that  
8 nothing has been changed there, so I'm not going to  
9 limit what he can admit it for, but I think there  
10 was an agreement that it was only showing last  
11 Thursday. I think there is agreement there.

12 So I'll admit Baca Exhibit V. No  
13 objection from any other defendants?

14 Not seeing or hearing any, the Court will  
15 admit Exhibit V for purposes of Mr. Baca's new trial  
16 motion.

17 (Defendant Baca Exhibit V admitted.)

18 BY MR. LOWRY:

19 Q. Ms. Delgado, I've backed up Defendant's  
20 Exhibit V to the one-minute mark. Can you describe  
21 to the Court what we're looking at right here?

22 A. I'm standing in the rec yard, and I am  
23 looking through -- the camera is pointed through the  
24 first door that -- in the -- aligned with the mesh  
25 netting that is used to enter the rec yard. Then

1 beyond that is the guard's booth, which is also two  
2 walls, so another two levels of mesh. And then  
3 finally, the window to Q-106.

4 Q. Is it -- pacing up and down the rec yard  
5 in recreation yard 1, how would you describe this  
6 vantage point in terms of being able to look into  
7 that window?

8 A. You are unable to see anything in that --  
9 beyond that window.

10 Q. Was there any better vantage point within  
11 the rec yard than this one?

12 A. No, sir.

13 Q. And even when you zoomed in just after the  
14 one-minute mark, were you able to distinguish  
15 anything within the cell?

16 A. No, sir.

17 Q. Was there any better vantage point in the  
18 recreation yard than that one we just looked at?

19 A. There was not.

20 MR. LOWRY: May I have a moment, Your  
21 Honor?

22 THE COURT: You may.

23 MR. LOWRY: No further questions, Your  
24 Honor.

25 THE COURT: Any other defendants? I know

1 there were some joinders on Mr. Baca's. Ms. Jacks,  
2 you joined it?

3 MS. JACKS: I did.

4 THE COURT: Do you have any further  
5 questions?

6 MS. JACKS: I do not.

7 THE COURT: How about you, Ms. Bhalla? Do  
8 you have further questions?

9 MS. BHALLA: No, Your Honor, thank you.

10 THE COURT: Any other defendants?

11 All right.

12 Ms. Armijo, do you have cross-examination  
13 of Ms. Delgado?

14 CROSS-EXAMINATION

15 BY MS. ARMIJO:

16 Q. Good afternoon, Ms. Delgado. Now, you  
17 took that at a time shortly before noon; is that  
18 correct?

19 A. Yes. We arrived at the prison at 11:00  
20 and then walked in. We were escorted to the rec  
21 yard, yeah.

22 Q. And you can see at various points of the  
23 video there that the sun is kind of coming down. I  
24 guess probably because of the position of where the  
25 buildings are; is that correct?

1 A. You can see the sun, yes.

2 Q. Okay. Now, did you ever try going to see  
3 what it looks like later in the day when you didn't  
4 have the sun glaring?

5 A. I didn't return.

6 Q. I'm sorry?

7 A. I did not return back.

8 Q. Okay. Because it might look a little bit  
9 different depending on the sun -- would you agree  
10 with that -- if the windows are tinted?

11 A. I can't agree with that. I don't know.

12 Q. Well, for instance, not there, but do you  
13 have the experience, for instance, you know, windows  
14 in my house are tinted, and depending the time of  
15 days, sometimes the people walking in front of my  
16 house can't see in at all, but other times, if  
17 you're driving by, depending on the placement of the  
18 sun, you can see right in. Would you agree that,  
19 just in general, with tinted windows, that depending  
20 on how the sun is, and the sunlight, that at times  
21 you could see in tinted windows more so than others,  
22 just as a general proposition?

23 A. I think it would depend on the tinting. I  
24 personally have my windows tinted in my car, and I  
25 can't see in them at any time.

1 Q. Okay. But it might depend on the tinting;  
2 correct?

3 A. Yes.

4 Q. And so you cannot testify to any other  
5 time of day that the windows would be -- look any  
6 different depending on the sunlight; correct?

7 A. I cannot.

8 Q. And now, do you know when modifications  
9 were made to that unit?

10 A. I don't.

11 Q. Okay. And you cannot testify that -- what  
12 is it -- U and V is an accurate representation of  
13 how the rec yard was back in 2012?

14 A. I cannot.

15 Q. You cannot even testify that that's an  
16 accurate representation from 2013.

17 A. No, I cannot.

18 Q. And did you take pictures reverse, where  
19 you were in the unit and you were looking at Mr.  
20 Lowry down in the rec yard?

21 A. No, ma'am.

22 Q. So you cannot testify what the person in  
23 the unit was -- in the housing unit looking down at  
24 the rec yard?

25 A. I cannot.

1 Q. And where is the video of you trying to  
2 talk to Mr. Lowry?

3 A. I did not attempt to talk to Mr. Lowry.

4 Q. Okay. So you did not attempt to say,  
5 "Hey, Marc, can you hear me?"

6 A. No, ma'am.

7 Q. So you cannot testify that someone in the  
8 rec yard could or could not talk to someone in 106?

9 A. I cannot.

10 MS. ARMIJO: I believe that -- if I may  
11 just have a moment, Your Honor?

12 THE COURT: You may.

13 MS. ARMIJO: That's all I have. Thank  
14 you.

15 THE COURT: Thank you, Ms. Armijo.

16 Anyone else before Mr. Lowry who wants to  
17 ask any questions of Ms. Delgado?

18 All right, Mr. Lowry, do you have redirect  
19 of Ms. Delgado?

20 MR. LOWRY: No, I don't, Your Honor.

21 THE COURT: All right. Ms. Delgado, you  
22 may step down.

23 Is there any reason that she cannot be  
24 excused from the proceedings, Ms. Armijo?

25 MS. ARMIJO: No, Your Honor.

1 THE COURT: Mr. Lowry, can she be excused?

2 MR. LOWRY: She may, Your Honor.

3 THE COURT: Anybody else object?

4 All right. You're excused. Thank you for  
5 your testimony.

6 All right, Mr. Lowry, does Mr. Baca have  
7 his next witness or evidence?

8 MR. LOWRY: Yes, the defense would call  
9 Jim Brewster, general counsel for the Department of  
10 Corrections.

11 THE COURT: Mr. Brewster, if you'll come  
12 up and stand next to the witness box on my right,  
13 your left, before you are seated, my courtroom  
14 deputy, Ms. Bevel, will swear you in.

15 JAMES ROBERT BREWSTER,  
16 after having been first duly sworn under oath,  
17 was questioned and testified as follows:

18 THE COURT: Mr. Brewster, Mr. Lowry.

19 DIRECT EXAMINATION

20 BY MR. LOWRY:

21 Q. Good afternoon, Mr. Brewster.

22 A. Good afternoon.

23 Q. Mr. Brewster, will you please state and  
24 spell your name for the court reporter?

25 A. My name is James Robert Brewster.



1 B-R-E-W-S-T-E-R.

2 Q. Mr. Brewster, how are you employed?

3 A. I'm the general counsel for the New Mexico  
4 Corrections Department.

5 Q. And as quickly as you can, what are some  
6 of your duties in the Office of General Counsel for  
7 the Corrections Department?

8 A. I provide day-to-day legal advice for  
9 managers, primarily. I'm also designated as the  
10 custodian for public records requests.

11 Q. And you understand that that's what brings  
12 you here today?

13 A. I do.

14 Q. And Mr. Brewster, just so you know, the  
15 parties have stipulated to the admission of the  
16 exhibits today, so I'm going to try to move through  
17 your testimony as quickly as we can, so you can get  
18 home.

19 But Mr. Brewster, you're familiar with  
20 defense counsel such as myself making requests of  
21 your institution for records concerning their  
22 clients?

23 A. Yes.

24 Q. And in fact, you've handled many such  
25 requests in the context of this case?

1           A.    I have.  And I haven't always known that  
2 they are related to this case.

3           Q.    But even early on in 2016, you got a  
4 request from my office for contracts and such for  
5 the Lucky 8 Production Facility.  Do you recall  
6 that?

7           A.    I do vaguely recall that, yes.

8           Q.    So would that have been a typical request  
9 for somebody unaffiliated with this case to have  
10 made?

11          A.    You know, I've gotten requests for that --  
12 documents from all sorts of people, defense counsel,  
13 reporters, various people.

14          Q.    But directing your attention to April of  
15 this year, you're familiar with the IPRA request I  
16 made to your office for recreational yard records  
17 for Level 6?

18          A.    Yes, sir.

19          Q.    And in fact, your office -- you understand  
20 that that request was for recreational records from  
21 September of 2011 to September 2012?

22          A.    That's correct.

23          Q.    And your office was able to respond to  
24 that request with a production of documents related  
25 to that year?

1 A. Yes.

2 Q. Mr. Brewster, I'm showing you what's  
3 marked as Defendant's Exhibit Y. Are you familiar  
4 with this document?

5 A. Yes, I'm familiar with it.

6 Q. And this would be one of the records that  
7 your office disclosed to my office through that IPRA  
8 request of April 17, 2018?

9 A. That's correct.

10 Q. And this document -- you can see  
11 Defendant's Exhibit Y is from September 12, 2012;  
12 correct?

13 A. That's correct.

14 Q. And this sort of runs through what the  
15 staff requirements are when people move from their  
16 housing unit into the recreation yard 3, which is  
17 the list at the top; correct?

18 A. I believe that's correct, yes.

19 Q. And one of the things you typically see  
20 when inmates are transferred from their holding cell  
21 into the recreational yard to exercise is, you know,  
22 all manner of standard operating procedures for  
23 correctional officers to follow; right?

24 A. Yes, sir. This is a typical form.

25 Q. And as part of that typical form, it has a

1 whole section that's entitled "The control of  
2 inmates," doesn't it?

3 A. Yes, it does.

4 Q. And it requires under "The control of  
5 inmates" that all inmates entering and leaving the  
6 unit are to be searched; correct?

7 A. That's what the form says, yes.

8 Q. And it even requires inmates to be patted  
9 down?

10 A. Yes, it says that.

11 Q. And this is typical for the Level 6 area?

12 A. It is.

13 Q. Moving on to the second page of  
14 Defendant's Exhibit Y, you would agree with me,  
15 wouldn't you, that this would give you sort of the  
16 overview of the movement of inmates into the yard  
17 from individual housing units, pods?

18 A. Yes.

19 Q. And so when you look at a form like this,  
20 you can tell exactly when, like, for instance, this  
21 says it's 6:10 a.m., "HU 3A yard turnout begins."  
22 Did I read that correctly?

23 A. Yes.

24 Q. And would you agree with me that reflects  
25 when the guards bring inmates from housing unit 3A

1 from their cells into the rec yard?

2 A. I believe that's correct.

3 Q. Then the next line down, just for an  
4 example, it would say from 7:12 a.m. to 7:27 HU 3A  
5 yard turn-in begins, meaning the guards would take  
6 inmates from the recreational yard back indoors to  
7 their holding cells?

8 A. That's correct.

9 Q. And by keeping records like this, you can  
10 sort of monitor the flow of inmates in and out of  
11 the recreation yard day in and day out?

12 A. I think that's accurate.

13 Q. On the third page of Defendant's Exhibit Y  
14 we're looking at, you would agree with me that on  
15 this date, September 12, 2012, it reflects that a  
16 Mr. Urquizo, Department of Correction number 50572,  
17 who resided in cell V-107, used recreation pen  
18 number 1 from 10:14 a.m. to 11:00 a.m.

19 A. That's correct.

20 Q. And he was escorted by an individual  
21 officer, Officer Torres, as reflected by this  
22 document; correct?

23 A. That's what the form says, yes, sir.

24 Q. And it's interesting to note -- I mean,  
25 you see, like, people, the inmates that are in the

1 different recreational units, they're all escorted  
2 out by different individuals?

3 A. Yes. I do see some of the names repeat,  
4 but yes.

5 Q. But does that tell you, as the general  
6 counsel, that these inmates are brought out one by  
7 one to the rec yard?

8 A. I'm not really sure I could tell you how  
9 they're brought out to the rec yard. That's not  
10 something that I deal with on a daily basis.

11 Q. But you would agree with me that this  
12 accurately reflects the records that are in your  
13 possession that we requested from that date range  
14 from September 2011 to September 2012?

15 A. Yes, all three of these documents you've  
16 shown me I produced to you.

17 Q. And in fairness, there were a lot more  
18 than these three; there are hundreds.

19 A. Correct.

20 Q. Now, you produced these recreation yard  
21 records for that year in question, 2011 to 2012, on  
22 May 10th, 2018, to my office; correct?

23 A. That's correct.

24 Q. And you did that via email?

25 A. Yes, sir.

1 Q. And because no good deed goes unpunished,  
2 that precipitated a second request four days later  
3 from my office?

4 A. Indeed it did.

5 Q. And that request covered the years from  
6 September 2012 to September 2014?

7 A. That's correct.

8 Q. Now, what happened with that request?

9 A. The second request we checked on and were  
10 led to understand that the documents had already  
11 been destroyed, so we couldn't produce any documents  
12 for you.

13 Q. Okay. And you responded to my office, in  
14 fact, just that, that on -- I believe it was on the  
15 afternoon of May 16, you responded to my office that  
16 you didn't have any records related to those later  
17 years?

18 A. That's correct.

19 Q. And not surprisingly, the response from my  
20 office was a little bit dumbfounded, and it said,  
21 "Wait a second. We just got a year earlier. What's  
22 going on," to that effect?

23 A. Yes.

24 Q. And why did you believe that documents  
25 didn't exist for the latter year on May 16?

1           A.     Because my office had been in phone  
2     conversations with the institution, and it was our  
3     understanding after talking with the institution  
4     that the records had been set up and already  
5     scheduled for and already gone through destruction.

6           Q.     So on May 16, you believed that these  
7     records had been, in fact, destroyed already?

8           A.     That's correct.

9           Q.     But that wasn't true, was it?

10          A.     That's correct. It wasn't true.

11          Q.     They were actually in a warehouse on the  
12     grounds of the penitentiary?

13          A.     They were apparently in line to be  
14     destroyed, but they weren't destroyed until the  
15     18th.

16          Q.     But you had no idea they were there?

17          A.     I had no idea they were there, based on  
18     our conversations.

19          Q.     Now, you would agree with me that the same  
20     officer who communicated with Daniel Salazar had  
21     just turned over to you -- and I'm looking at  
22     Defendant's Exhibit X here -- an email. He had just  
23     disclosed a lot of attachments related to that  
24     earlier request that we made from 2011 to 2012?

25          A.     That's correct.



1 Q. And he had done that on -- this is dated  
2 May 9th, but he says he's going to provide them to  
3 you the next day, May 10th.

4 A. That's correct.

5 Q. And that's when you provided them to me?

6 A. Yes, sir, by Dropbox.

7 Q. And then by the 16th, when you asked him,  
8 "Hey, we got another request," he tells you they're  
9 gone, they're destroyed?

10 A. That's my understanding of what he said,  
11 yes.

12 Q. And you didn't -- in fairness, you  
13 literally took that at face value?

14 A. Yes.

15 Q. And you didn't do any follow-up requests  
16 saying, "Hey, we just got hundreds of documents for  
17 the previous years; when did these get destroyed?"

18 A. No, we didn't follow up. I didn't see a  
19 need to.

20 Q. And when my office requested on the very  
21 next day after your office telling us there was  
22 nothing remaining, we sent you a preservation  
23 request on May 17?

24 A. Yes, you did.

25 Q. And in fact, when we sent that

1 preservation request, those documents were still on  
2 the grounds in the PNM North, weren't they?

3 A. They were still on the ground, but we  
4 didn't think they were.

5 Q. Okay. You didn't think they were.

6 A. That's correct.

7 Q. Because you had been misinformed?

8 A. Either we had been misinformed or we  
9 misunderstood. As far as I know, we were -- my  
10 paralegal talked to the institution and they said  
11 those documents had been destroyed. I guess there  
12 is a slight possibility she misunderstood that, but  
13 I don't know that for sure.

14 Q. Well, I mean, she actually emailed to me  
15 and said that they had been destroyed.

16 A. Correct.

17 Q. Past tense.

18 A. Correct.

19 Q. In fairness, you review all of her  
20 correspondence that goes out to opposing counsel  
21 like me?

22 A. I do, yes.

23 Q. So you shared that view, that the  
24 documents that I had sought to be preserved had been  
25 destroyed, in the past tense?

1 A. Yes.

2 Q. But again, in reality, they were sitting  
3 in PNM in the warehouse?

4 A. Yes, that's correct.

5 Q. Because you believed the documents had  
6 been destroyed, you didn't do anything with the  
7 preservation request, like forward it to Level 6 or  
8 forward it to any of the records -- the secondary  
9 records custodians, if you will, on the grounds?

10 A. That's correct.

11 Q. And then it wasn't until I sent yet a  
12 third IPRA request that you came across documents  
13 that indicated that these records had actually been  
14 destroyed on May 18?

15 A. Yes, I saw the destruction notice. It was  
16 dated May 18.

17 Q. And in fairness, that's just the date they  
18 were picked up by the document destruction company?

19 A. I assume that's the date they were picked  
20 up, and destroyed on that same day. But I mean, I  
21 wasn't physically with them when they destroyed  
22 them. But that's my assumption, yes.

23 Q. Well, you provided me with what's marked  
24 as Defendant's Exhibit CC. I mean, you do recognize  
25 this document, don't you?

1 A. Yes.

2 Q. And this was the receipt for the  
3 destruction of these materials?

4 A. Yes, sir.

5 Q. And if you look at the fine print or  
6 not-so-fine print at the bottom of this, actually  
7 Adelante Document Destruction Services certified  
8 that these documents will be confidentially handled  
9 and completely destroyed beyond recognition within  
10 three business days of May 18, 2018?

11 A. Correct.

12 Q. So Defendant's Exhibit CC really reflects  
13 the day that these 301 banker's boxes of recreation  
14 yard and other records from the State Pen were  
15 picked up by Adelante Document Destruction Services;  
16 correct?

17 A. That's what the document indicates, yes.

18 Q. So they could have existed for a period of  
19 up to three days after that, if this company abided  
20 by the language in this document?

21 A. Correct.

22 MR. LOWRY: One moment, Your Honor.

23 THE COURT: Certainly.

24 MR. LOWRY: No further questions, Your  
25 Honor.

1 THE COURT: All right. Thank you, Mr.  
2 Lowry.

3 Any other defendant have any questions of  
4 Mr. Brewster?

5 All right, Ms. Armijo, do you have  
6 cross-examination of Mr. Brewster?

7 MS. ARMIJO: Yes, Your Honor.

8 CROSS-EXAMINATION

9 BY MS. ARMIJO:

10 Q. Good afternoon, Mr. Brewster.

11 A. Good afternoon.

12 MS. ARMIJO: Your Honor, at this time the  
13 United States would like to move into evidence  
14 Government's Exhibit 1 for purposes of this motion,  
15 which is Mr. Brewster's affidavit. It was attached.

16 THE COURT: Any objection, Mr. Lowry?

17 MR. LOWRY: No, Your Honor.

18 THE COURT: Any other defendant have an  
19 objection?

20 Not hearing or seeing an objection,  
21 Government's Exhibit 1 for purposes of Mr. Baca's  
22 new trial motion will be admitted into evidence.

23 (Government Exhibit 1 admitted.)

24 THE COURT: Ms. Armijo.  
25

1 BY MS. ARMIJO:

2 Q. Mr. Brewster, I have up on the screen the  
3 affidavit. It says "Affidavit of James Brewster."

4 Are you familiar with this item?

5 A. Yes, I am.

6 Q. Did you actually write this item?

7 A. Yes, I did.

8 Q. And was it at the request of the United  
9 States Attorney's Office, in reference to the motion  
10 that we're here on today, that you're testifying  
11 about?

12 A. Yes, it was.

13 Q. And is everything correct to the best of  
14 your recollection on this document as to the three  
15 different IPRA requests that Mr. Lowry made after  
16 the conclusion of the trial of Mr. Baca?

17 A. It's accurate, yes, ma'am.

18 Q. Now, what is the policy -- just so that  
19 we're clear, what is the policy for the retention of  
20 the records that Mr. Lowry was seeking?

21 A. Well, there is a statute, and our policy  
22 normally follows the statute. And under the  
23 regulation, I call it -- it's not really a  
24 statute -- it says that documents, rec yard --  
25 recreation documents of inmates can be destroyed

1 within three years after they're created, basically.  
2 And so the policy would have been normally to be  
3 able to destroy those documents after three years.

4 Q. And in reference to the ones that -- the  
5 second IPRA request, the ones that you had believed  
6 were already destroyed, what was the date of that  
7 request for those records?

8 A. I believe that was in the middle of May of  
9 2018. I don't recall the exact date. I think it  
10 may have been either the 14th or 16th. I'm not sure  
11 which.

12 Q. All right. And I'm going to page 2 of  
13 exhibit --

14 THE COURT: Ms. Armijo, I've got to give  
15 Ms. Bean a break. Can we take about a 15-minute  
16 break and we'll come back in and work about an hour?

17 MS. ARMIJO: Certainly, Your Honor.

18 THE COURT: All right. We'll be in recess  
19 about 15 minutes, and then we'll put in another  
20 hour.

21 (The Court stood in recess.)

22 THE COURT: Let's go back on the record.

23 All right, Mr. Brewster, I'll remind you  
24 that you're still under oath.

25 Ms. Armijo, if you wish to continue your

1 cross-examination of Mr. Brewster, you may do so at  
2 this time.

3 BY MS. ARMIJO:

4 Q. All right, Mr. Brewster, I think we were  
5 talking about -- I was referring to page 2 of  
6 Exhibit Number 1 for purposes of this motion, and  
7 there is a second IPRA request that is from  
8 9/14/2012 to 3/6/2014; correct?

9 A. That's correct.

10 Q. And that is the one that, here, your  
11 office had received word that they were already  
12 destroyed; correct?

13 A. That's correct.

14 Q. And so if the request was in May of 2018  
15 and the date was -- this is making me dizzy,  
16 sorry -- March of 2014, the destruction would have  
17 been already expected or at least already allowed to  
18 have been done; correct?

19 A. Yes. All of those documents were eligible  
20 for destruction under the regulation.

21 Q. And I believe the line that you used was  
22 "in line to be destroyed." Can you explain to us  
23 the process for the destruction?

24 A. My general understanding of it is that we  
25 have a contract with various companies that destroy



1 documents. Each facility utilizes a destruction  
2 company when they need to destroy documents, and so  
3 they reach out to them under that contract and make  
4 arrangements for them to come by and pick up  
5 documents for destruction.

6 Q. And so in May of 2018, have the records at  
7 issue already been in line to be destroyed?

8 A. Yes, that's my understanding. They were  
9 already in line to be destroyed.

10 Q. And in addition to that, what was the  
11 condition of the boxes and where they were being  
12 kept?

13 A. My understanding, based on discussions  
14 with personnel over at the facility was that the  
15 boxes were not in good shape, and the room that they  
16 were in, there were, you know, animal droppings,  
17 probably mice or rat droppings, and urine, and it  
18 was not a good environment to keep the boxes in  
19 there. And that was another reason I think they  
20 were looking to move to get them out of there.

21 Q. Now, you also received a third IPRA  
22 request from Mr. Lowry's office after the second one  
23 was responded to; correct?

24 A. That's correct.

25 Q. And as part of that, was part of that

1 request whether or not you had been in communication  
2 with the U.S. Attorney's Office about destruction of  
3 any records?

4 A. Yes, that was a part of it.

5 Q. And what was the response to that?

6 A. The response was: There had been no  
7 communications, there had been no directions or  
8 suggestions or anything else from your office  
9 telling me to destroy those documents.

10 Q. And in fact, were you aware that the  
11 prosecution team was during this time period in the  
12 second trial in this investigation?

13 A. Yes, I'm aware that you continued on in  
14 the second trial at that point, yes.

15 Q. And was there any direction or any  
16 communication by your office to our office about the  
17 ongoing IPRA request by Mr. Lowry during this time  
18 period?

19 A. There was not.

20 Q. You were also asked about --

21 MS. ARMIJO: Mr. Lowry, do you have the  
22 documents, your exhibits?

23 Q. You were also asked about I believe it is  
24 Y. Do you recall being asked questions about this  
25 document?

1 A. Yes, I do.

2 Q. And specifically the second page of that.

3 Hold on. The third page. My mistake. Which has  
4 the times that people go out; correct?

5 A. That's correct.

6 Q. And you indicated that you saw some of the  
7 names repeated; is that correct?

8 A. Yes.

9 Q. For instance, I see Torres taking Urquizo  
10 at 10:14, and Torres taking another inmate at 10:19;  
11 is that correct?

12 A. Yes, ma'am. That's correct.

13 Q. And so would that mean that all of these  
14 individuals could have potentially been out there at  
15 the same time but within different rec cages?

16 A. I believe it is possible. I don't really  
17 know how they do that, sitting here today. I'm not  
18 familiar with that.

19 Q. Okay. So although you can testify that  
20 these are records that are kept in the normal course  
21 of business for Corrections, you cannot really tell  
22 us what it means as far as if the inmates were out  
23 together or how it's handled?

24 A. I can't tell you how they do that. That's  
25 not something that I'm involved in.

1 Q. And although it says findings here, these  
2 things are checked, you have no way of knowing how  
3 thorough a job each officer is in filling out and in  
4 doing each of these with each inmate; correct?

5 A. I don't have any way of knowing that for  
6 certain. That's correct.

7 MS. ARMIJO: If I may have a moment, Your  
8 Honor.

9 THE COURT: You may.

10 MS. ARMIJO: Thank you. I pass the  
11 witness.

12 THE COURT: Thank you, Ms. Armijo.

13 Any other defendant have any redirect of  
14 Mr. Brewster?

15 Not seeing any, Mr. Lowry, do you have  
16 redirect of Mr. Brewster?

17 MR. LOWRY: Just very briefly, Your Honor.

18 THE COURT: Mr. Lowry.

19 REDIRECT EXAMINATION

20 BY MR. LOWRY:

21 Q. Mr. Brewster, you testified at the first  
22 trial in this case, didn't you?

23 A. I did.

24 Q. And I take it that over the course of this  
25 investigation at various points, you've been

1 involved with almost everyone involved in the case?

2 A. I mean, I'm familiar generally with the  
3 people involved in the case, not necessarily by  
4 knowing their names, but having seen them in the  
5 courtroom, that sort of thing.

6 Q. Right. But you knew that there was  
7 litigation going on with regard to this case because  
8 you'd actually participated in it?

9 A. Yes.

10 Q. And regardless of how long a document has  
11 been warehoused at the penitentiary, if somebody  
12 makes a request for it and you have it, in the  
13 typical course of business you're going to provide  
14 it to them?

15 A. I'm going to provide it unless there is  
16 some exception or exemption under the State Records  
17 Act that would allow me or basically mandate me not  
18 to provide it, yes.

19 MR. LOWRY: No further questions, Your  
20 Honor.

21 THE COURT: Thank you, Mr. Lowry.

22 All right, Mr. Brewster, you may step  
23 down.

24 Is there any reason Mr. Brewster cannot be  
25 excused from the proceedings, Ms. Armijo?

1 MS. ARMIJO: No, Your Honor.

2 THE COURT: Mr. Lowry?

3 MR. LOWRY: No, Your Honor.

4 THE COURT: Any other defendants object?

5 Not seeing any objections, you're excused  
6 from the proceedings. Thank you for your testimony.

7 Do you have further witnesses or evidence  
8 you wish to present, Mr. Lowry?

9 MR. LOWRY: I don't, Your Honor.

10 THE COURT: Ms. Armijo, do you have  
11 witnesses or evidence to present?

12 MS. ARMIJO: I do, Your Honor. Before I  
13 call witnesses, Your Honor, I'm going to move some  
14 items into evidence.

15 THE COURT: You may.

16 MS. ARMIJO: I believe without objection,  
17 Exhibits 2, 3, 4, 5, 6, and 7 are all additional  
18 debriefs of Lupe Urquizo.

19 THE COURT: And you're moving their  
20 admission?

21 MS. ARMIJO: Yes, Your Honor.

22 THE COURT: Any objection, Mr. Lowry?

23 MR. LOWRY: No, Your Honor. I believe  
24 that's part --

25 THE COURT: Anyone else have any

1 objections? Any other defendant?

2 Not seeing or hearing any, Government's  
3 Exhibits 2, 3, 4, 5, 6, and 7. Government's  
4 Exhibits. Those numbers will be admitted into  
5 evidence for purposes of Mr. Baca's new trial  
6 motion.

7 (Government Exhibits 2 through 7  
8 admitted.)

9 THE COURT: Ms. Armijo.

10 MS. ARMIJO: The United States is going to  
11 call Sergio Sapien to testify. I believe he's on  
12 his way in.

13 THE COURT: Mr. Sapien, if you'll come up  
14 and stand next to the witness box on my right, your  
15 left, before you're seated, my courtroom deputy,  
16 Ms. Bevel, will swear you in.

17 THE WITNESS: Yes, sir.

18 SERGIO SAPIEN,  
19 after having been first duly sworn under oath,  
20 was questioned and testified as follows:

21 THE COURT: Mr. Sapien, Ms. Armijo.

22 DIRECT EXAMINATION

23 BY MS. ARMIJO:

24 Q. Can you please state your name.

25 A. Sergio Sapien.

1 Q. How are you employed?

2 A. With the New Mexico Corrections  
3 Department, Security Threat Intelligence Unit.

4 Q. How long have you worked for the  
5 Corrections Department?

6 A. Almost 19 years.

7 Q. And what is your current title?

8 A. Security Threat Intelligence Unit captain  
9 at the Penitentiary of New Mexico.

10 MS. ARMIJO: And Your Honor, I'm also  
11 going to move into evidence Exhibit Number 8, which  
12 is the North facility.

13 THE COURT: Any objection, Mr. Lowry?

14 MR. LOWRY: May I see it? No.

15 THE COURT: No objection, Mr. Lowry?

16 MR. LOWRY: No, Your Honor.

17 THE COURT: Anybody else? Any defendant?

18 Not seeing or hearing any, Government's  
19 Exhibit 8 will be admitted for purposes of Mr.  
20 Baca's new trial motion.

21 (Government Exhibit 8 admitted.)

22 THE COURT: Ms. Armijo.

23 BY MS. ARMIJO:

24 Q. Captain, now, the Security Threat  
25 Intelligence Unit -- is that more commonly known as



1 STIU?

2 A. Yes, ma'am.

3 Q. And what primarily are your duties with  
4 that?

5 A. Monitoring, documenting gang-type activity  
6 within the prison system. Ending security threats  
7 to the facility or its staff we deal with.

8 Q. And you mentioned you've been with  
9 Corrections for 19 years. What are the different  
10 positions you have held during that time period?

11 A. Correctional officer, correctional officer  
12 sergeant, correctional officer lieutenant.

13 Q. And then what about since being with STIU?

14 A. Captain.

15 Q. And I want to go back to approximately  
16 2011, 2012. What was your position at that time?

17 A. I believe I was the lieutenant at the  
18 time.

19 Q. And where were you assigned?

20 A. For a moment, approximately a year, I was  
21 the housing unit 3 lieutenant at the North facility.

22 Q. And just so that we're clear, the North  
23 facility is part of PNM?

24 A. Yes, ma'am.

25 Q. And I have displayed up Exhibit Number 8.

1 Maybe I should do it this way. How is that -- is  
2 that better? What is it that we're looking at?

3 A. An aerial view of the North facility at  
4 PNM.

5 Q. And do you see there an area which would  
6 include Q?

7 A. Q pod, yes, ma'am.

8 Q. And where is that? And you should be able  
9 to touch your screen.

10 A. Okay, Q pod should be right here.

11 Q. Okay. And so you have a little dot on the  
12 left side of the screen there; is that correct?

13 A. Here, I could -- this would be Q pod.

14 Q. And what pod is next to it?

15 A. R pod.

16 Q. And then -- okay. And so is this -- to  
17 the left of where you drew, is that R pod?

18 A. Yes, ma'am.

19 Q. And then what other pods are in that same  
20 facility?

21 A. In that same unit is S and T pods.

22 Q. Okay. And can you tell us a little bit  
23 about how during -- I'm looking at a time period,  
24 2011, 2012, around -- what the system was for  
25 recreation?

1 A. As far as inmates from housing unit 3?

2 Q. Yes.

3 A. They're allowed an hour outside recreation  
4 time in those cages right there on the photograph.

5 Q. Now, are you familiar with Anthony Baca?

6 A. Yes, ma'am.

7 Q. How so?

8 A. He was --

9 MR. LOWRY: Your Honor, this is beyond the  
10 scope of -- pardon me.

11 THE COURT: Well, I think it's Mr. Baca's  
12 new trial motion. Let me see what her questions  
13 are. I think this question is within the scope.  
14 Overruled.

15 BY MS. ARMIJO:

16 Q. Did you have a chance -- did I send you  
17 and ask you questions about the location histories  
18 of Mr. Baca and Mr. Urquizo?

19 A. Yes.

20 Q. And was that part in being able to respond  
21 to the motion for which you're here to testify?

22 A. Yes, ma'am.

23 Q. And are you familiar with location  
24 histories and how they work?

25 A. Yes, ma'am.

1 MS. ARMIJO: And Your Honor, at this time  
2 I'd like to move into evidence -- I think I'm on 9  
3 and 10. Mr. Baca's is going to be 9 and Mr.  
4 Urquizo's location history will be 10.

5 THE COURT: Any objection, Mr. Lowry?

6 MR. LOWRY: No, Your Honor. I think  
7 they've already been admitted at trial.

8 THE COURT: At trial? All right. Any  
9 other defendant have any objection?

10 All right. Not hearing any, Government's  
11 Exhibits 9 and 10 will be admitted for purposes of  
12 Mr. Baca's new trial motion.

13 (Government Exhibits 9 and 10 admitted.)

14 BY MS. ARMIJO:

15 Q. And so as part of captain of the STIU, are  
16 you familiar with those two individuals?

17 A. Yes, ma'am.

18 Q. And do you know them to be at one time or  
19 currently SNM Gang members?

20 A. Yes.

21 Q. What is Mr. Baca's position in the SNM  
22 Gang?

23 A. High-ranking.

24 MR. LOWRY: Objection, Your Honor,  
25 relevance.

1 THE COURT: Tell me how it's relevant.

2 BY MS. ARMIJO:

3 Q. In your experience and communication --

4 THE COURT: Let's see what the new  
5 question is.

6 Q. In your experience and communications with  
7 people who are housed in a housing unit with inmates  
8 that are in the rec yard, does it make a difference  
9 if someone is a leader within a gang and how they  
10 are treated by other members and how they  
11 communicate?

12 A. Yes.

13 Q. And how do you have that experience? Have  
14 you seen that?

15 A. In reference to the recreation yard and  
16 the housing units?

17 Q. Yes.

18 A. If we have a high-ranking individual or a  
19 more respected individual in either Q or R pods, any  
20 time members of that particular organization are out  
21 in the yard, they're going to pay their respects to  
22 that individual.

23 Q. How do they do that?

24 A. Either coming out or going in, they'll  
25 say, "Good morning," "Good afternoon," whatever,

1 just to ensure that they're saying, "Hi," paying  
2 respects.

3 Q. And are you aware of whether Mr. Baca  
4 would be in that category that inmates would pay  
5 respect to when they're on the recreational yard if  
6 he is inside?

7 A. Yes, ma'am.

8 Q. Now, did you have a chance to look at  
9 where Mr. Baca and Mr. Urquizo were housed during  
10 2011 and 2012?

11 A. I did, but it's been a while.

12 Q. Okay.

13 MS. ARMIJO: May I approach the witness,  
14 Your Honor?

15 THE COURT: You may.

16 BY MS. ARMIJO:

17 Q. Now, with those two documents in front of  
18 you, I'm going to ask you a couple of questions.  
19 Was Mr. Baca housed in N 3B X 112 from May 12, 2011,  
20 through February 11, 2012?

21 A. May through -- I'm sorry?

22 Q. May 2011 through February 27, 2012. And  
23 maybe another way for me to do it would be to put it  
24 on the screen and I can point.

25 A. I'm sorry, I was looking at the wrong one.

1 I apologize.

2 Q. All right. Showing you Exhibit Number  
3 9 -- I can't clear it. All right. I'm looking  
4 right here. Can you see May 12, 2011, to 2/27/2012?

5 A. Yes, ma'am.

6 Q. And where does it appear that Mr. Baca is?

7 A. 3B X 112. That would be the North  
8 facility.

9 Q. Okay. Then I'm also going to put up here  
10 Exhibit Number 10, which you can see is Mr. Urquizo;  
11 is that correct?

12 A. Yes, ma'am.

13 Q. Are you familiar with who Mr. Urquizo is?

14 A. Yes, ma'am.

15 Q. And back in 2011, 2012, 2013, was he an  
16 SNM Gang member?

17 A. Yes, ma'am.

18 Q. Okay. And then looking at September 12,  
19 2011, here we go, do you see here 2012, 2011?

20 A. Yes.

21 Q. And what housing unit was he there?

22 A. 3B V 107.

23 Q. Now, is 3B all the same building?

24 A. Yes, ma'am.

25 Q. And so when people from -- even though

1 they're in different pods, when they are in  
2 recreation, where do they do rec?

3 A. They all rec at the same -- those same  
4 cages right there, located, yes, ma'am.

5 Q. Okay. So in Government's Exhibit 8 I'm  
6 showing the cages there; is that correct?

7 A. Yes.

8 Q. Okay. So even though they're in different  
9 housing pods, if they're in the same building, they  
10 still do recreation there?

11 A. Yes, ma'am.

12 Q. Now, I'm going to go to a time period when  
13 Mr. Baca -- I'm going to show it up here again --  
14 was housed in Q-106. Do you see that?

15 A. Yes.

16 Q. So that would appear from February 27,  
17 2012, to June 29, 2012?

18 A. Um-hum.

19 Q. And that is Q-106?

20 A. Yes, ma'am.

21 Q. Okay. Going to Exhibit 8, was that the  
22 unit that you were referring to earlier which is  
23 near the rec area?

24 A. Yes.

25 Q. So during that time period, are you



1 familiar with where Q-106 was located?

2 A. Yes, ma'am.

3 Q. And are inmates who are doing recreation  
4 in general -- are they able to communicate with  
5 inmates who are housed in Q-106?

6 A. Yes, ma'am.

7 Q. And how is that possible?

8 A. They can do hand signals; they yell; talk  
9 back and forth.

10 Q. Okay. And you say they yell back and  
11 forth?

12 A. Yes, ma'am.

13 Q. So they can carry on a conversation?

14 A. Yes, ma'am.

15 Q. And have you seen that during your time  
16 working there?

17 A. Yes, ma'am.

18 Q. And is it still possible to do today?

19 A. It still happens today.

20 Q. And are you aware -- you said hand  
21 signals. Tell us about that.

22 A. Just like sign language type signals, the  
23 best I can explain it.

24 Q. Now, did you have an opportunity to see a  
25 video? Were you aware of the fact that Mr. Lowry

1 was there with his investigator -- and I say  
2 "there," at the North facility this past Thursday?

3 A. Yes, ma'am.

4 Q. And did you have an opportunity during the  
5 break -- did I show you two video clips?

6 A. Yes, ma'am.

7 Q. In looking at the video clips, is that an  
8 accurate representation of how a person can actually  
9 see or not see into the cells?

10 A. I would think -- I mean, in my opinion,  
11 it's a little different. And what I can relate it  
12 to is, if I'm taking a picture of a landscape with  
13 my cellphone that I like, I'm looking at it, looks  
14 really nice, and I take a picture. For instance,  
15 the moon. It's big and out one day. I take a  
16 picture on my cellphone; it doesn't look the same as  
17 the way I'm looking at it with my normal eye.

18 Q. So can you see, if you are in the rec  
19 yard, into Q-106?

20 A. Yes, ma'am.

21 Q. Depending on the angle?

22 A. Depending on the angle and what yard  
23 you're in. There's I believe 12 rec yards out  
24 there.

25 Q. Okay. And so you can see?

1 A. Yes, ma'am.

2 Q. Now, the video that you saw, there were  
3 some coverings on some of the windows; is that  
4 correct?

5 A. Yes, ma'am.

6 Q. Do you know when those coverings were put  
7 there?

8 A. I can't recollect the exact date, no.

9 Q. Do you know if they were even there in  
10 2012?

11 A. I can't recall.

12 Q. And do you know, do they completely cover  
13 the window, or does there have to be some sort of  
14 opening, by law or regulation?

15 A. If I can recall, I believe that we were  
16 having the issues with the communication from the  
17 cells onto the yard, and they are at a 45-degree  
18 angle. Some face different ways or angle different  
19 ways. At one time I believe they put them out flat  
20 with the window, but you know, out 6 inches away  
21 from the window, and there was an issue with  
22 sunlight regulations coming into the cell. There  
23 has got to be a certain amount of light coming into  
24 the cell.

25 Q. So as they are today, it's at a 45-degree

1 angle?

2 A. Yes, ma'am.

3 Q. But depending on the cell, it could be 45  
4 degrees a different way?

5 A. One way or the other, yes, ma'am.

6 Q. Was there also a change in the rec yard as  
7 far as some sort of building being -- or structure  
8 being built?

9 A. Yes, ma'am.

10 Q. Tell us about that.

11 A. What I can recall is that there was an  
12 officer station that was put in or implemented in  
13 yard 3. I can't remember the exact date or time  
14 that it was implemented. In 2011, 2012, when I was  
15 the housing unit lieutenant for housing unit 3, I  
16 don't recall that being there.

17 Q. Now, when you were there in 2011 to 2012,  
18 you indicated you don't believe it was there. Tell  
19 us -- but you don't know the exact date it was  
20 constructed. Why is it -- what memory do you have  
21 as far as when you were a lieutenant there that  
22 leads you to believe that?

23 A. Currently, the officers use that little  
24 officer station, and I believe it's got Plexiglas  
25 windows, and that's where they hand out the keys for

1 the rec yards, as currently. When I was a  
2 lieutenant there, the officer would sit in what we  
3 call the dog run, which is the little hallway that  
4 runs from outside housing unit 3A into the rec  
5 yards. And that's where the officer was stationed.  
6 That's where they sat, and that's where the little  
7 keyboard was, and they issue out keys and complete  
8 their paperwork.

9 Q. And that's how it is currently?

10 A. No, that's how it was before.

11 Q. And that's how you remember it?

12 A. Yes, ma'am.

13 Q. And once that was built, that changed?

14 A. Yes, ma'am.

15 Q. Now, so you indicated -- explain to us a  
16 little bit about if Mr. Baca was in Q-106 and if  
17 people were recreating there, what would be the  
18 common experience for -- I should say, when I say  
19 "people," other SNM Gang members specifically.

20 A. Given the --

21 MR. LOWRY: Objection, Your Honor. This  
22 calls for speculation.

23 THE COURT: Well, I think he can talk  
24 about his common experience there in the prison. If  
25 he can't, then he can say so. But I'll allow him to

1 answer the question. Overruled.

2 A. Could you repeat it? I'm sorry.

3 BY MS. ARMIJO:

4 Q. When Mr. Baca was in Q-106 and there were  
5 people, SNM members, that were in the rec yard,  
6 based on your experience, what type of communication  
7 could be going on with Mr. Baca?

8 A. Based on experience, anybody knowing that  
9 he's in that cell, so close to the yard, when  
10 they're escorted in and out of the yard, of course,  
11 they're going to say, "Hello," "Goodbye," however  
12 they say that. And they'll also talk real  
13 frequently while they're in the rec yard for the  
14 amount of time that they're in there with whoever is  
15 housed, whether it be Mr. Baca or somebody with  
16 influence that's housed in those pods.

17 Q. And did he have the influence back in  
18 2011, 2012, 2013?

19 A. Yes, ma'am.

20 Q. When I say "influence," I'll be specific.  
21 Within the SNM Gang.

22 A. Yes, ma'am.

23 Q. Now, do people who are not only in the  
24 building that communicate with people outside -- but  
25 what about people that are doing rec together? Can

1 they communicate?

2 A. Yes, ma'am.

3 Q. And do people in different pods but in the  
4 same unit, the same building -- do they recreate  
5 together at different times?

6 A. Yes, ma'am.

7 Q. Now, I'm also going to show you  
8 Defendant's Exhibit Y. Are you familiar with these  
9 forms? I'm showing you the first page of Y, and  
10 then there is a second page there?

11 A. Yes, ma'am.

12 Q. What is it that we're looking at?

13 A. I'm sorry, I've got a glare up here. The  
14 first page is just a checklist for the yard officer  
15 indicating that the COs are randomly quizzed on  
16 their post orders. Everything is present that's  
17 assigned to the post; what's working, what's not  
18 working, stuff like that. That first page. The  
19 second page is going to be a post log. The officers  
20 will fill that out when they're assigned to a post.

21 Q. And then a third page?

22 A. That looks like a recreation list.

23 Q. All right. And so it shows here on this  
24 one -- it says 9/12/12, and it says "Urquizo." Time  
25 in was 10:14. Time out 11:00; is that correct?

1 A. Yes, ma'am.

2 Q. And I see that he was escorted by Officer  
3 Torres; is that correct?

4 A. Yes.

5 Q. Now, I see also at 10:19 Torres was  
6 already escorting out, so five minutes later he was  
7 already escorting out somebody else; is that  
8 correct?

9 A. Yes, ma'am.

10 Q. So would that have meant that all these  
11 people here at different points would all be  
12 recreating together?

13 A. As far as the officers?

14 Q. Not the officers; the inmates.

15 A. Yes, that's one recreation, I believe.

16 Q. Okay. Now, as part of that, do the  
17 officers -- are they supposed to conduct a search on  
18 inmates before they go out?

19 A. Yes, ma'am.

20 Q. Does that always happen?

21 A. I'd like to say yes, but probably not  
22 correctly every time.

23 Q. Okay. Are you aware of instances when  
24 inmates have taken out to the yard items that  
25 they're not supposed to have?



1 A. Yes, ma'am.

2 Q. And would that include things like paper?

3 A. It could.

4 Q. Include things like weapons?

5 A. Yes, ma'am.

6 Q. What other types of things have you seen  
7 that inmates have gotten out on the rec yard where  
8 they were supposed to have been checked?

9 A. Coffee, Walkmen, CD players, MP3 players,  
10 stuff like that.

11 Q. So then it's possible for an inmate to  
12 take out a piece of paper?

13 A. Yes, ma'am.

14 MS. ARMIJO: If I may have a moment, Your  
15 Honor?

16 THE COURT: You may.

17 BY MS. ARMIJO:

18 Q. And I guess just to follow up, are you  
19 aware of whether or not they bring shanks to the  
20 yard, because sometimes there were actual fights  
21 with them and things are confiscated on the yard?

22 A. Yes, ma'am.

23 Q. So it's possible that things are not  
24 always detected that are taken out?

25 A. Yes, ma'am.

1 MS. ARMIJO: That's all I have. Thank  
2 you, Your Honor.

3 THE COURT: Thank you, Ms. Armijo.

4 Before Mr. Lowry redirects, any other  
5 defendant have any questions of Mr. Sapien?

6 All right. Mr. Lowry, if you wish to  
7 redirect (sic) Mr. Sapien, you may do so.

8 CROSS-EXAMINATION

9 BY MR. LOWRY:

10 Q. Good afternoon, Mr. Sapien.

11 A. How are you doing, sir?

12 Q. You said you were a lieutenant in 2011,  
13 2012?

14 A. Yes, sir.

15 Q. Okay. Now lieutenants normally don't run  
16 the recreation yards, do they?

17 A. "Run" as in --

18 Q. Well, you don't sit out in the guard shack  
19 and manage the keys like you were talking about?

20 A. Not unless they're on overtime, no, sir.

21 Q. So normally you have a position in more  
22 the administrative part of the facility?

23 A. Yes, sir.

24 Q. Now, you went over some offender location  
25 history documents with Ms. Armijo, and I want to

1 show you what's been marked as Government's Exhibit  
2 10. Now, you would agree with me that Mr. Urquizo  
3 was transferred from the North facility to the South  
4 facility, meaning from Level 6 to Level 5, on  
5 September 13, 2012; correct?

6 A. Yes, sir.

7 Q. So that would be the day he was  
8 transferred, on the 13th of September 2012?

9 A. Yes, sir.

10 Q. And if you look at Mr. Baca's physical  
11 location history in September of 2012, he's in the  
12 North 3A, the S unit; correct?

13 A. Yes, sir.

14 Q. So hypothetically, if somebody claims that  
15 they're in the recreation yard on September 13 or  
16 even the 12th of 2012, they wouldn't be able to sign  
17 to Mr. Baca, who was housed in the S unit, would  
18 they?

19 A. Depending upon what time they took him  
20 out.

21 Q. But I mean, if you assume Mr. Baca is  
22 inside the interior in his cell, they wouldn't be  
23 able to sign to him from the first recreational  
24 cage, could you?

25 A. You could from the first one, possibly

1 even the second one.

2 Q. So the S?

3 A. S? Oh, I'm sorry. S pod, no, sir.

4 Q. Correct. S pod. Mr. Baca is in S pod;  
5 correct?

6 A. Sorry.

7 Q. Your testimony was, you may be able to  
8 sign somebody in the Q pod?

9 A. Yes, sir.

10 Q. But if you were in the S pod, it would be  
11 impossible, wouldn't it?

12 A. Um-hum.

13 Q. And that's because -- I want to make sure  
14 the Court gets this. If we look at this -- and you  
15 said you're familiar with this layout, I would  
16 assume; correct?

17 A. Yes, sir.

18 Q. I'll blow this up. Now, this is 3A North?

19 A. Yes, sir.

20 Q. You say in 3A, I guess, in the correct  
21 terminology. In 3A?

22 A. Yes, sir.

23 Q. And if you had to label the cells in  
24 order -- and you said you're familiar with it -- can  
25 you mark this? They would start in this little

1 notch. If we mark this, it would start from right  
2 to left, Q-1, 2, 3, 4, 5, and 6; correct?

3 A. Yes, sir.

4 Q. So Q-6 actual cell would be right in this  
5 notch in the building right there?

6 A. Right here.

7 Q. Thanks. Exactly. Right there. And you  
8 said this is the Q unit there, and the next one over  
9 is --

10 A. Q, R, and S.

11 Q. And if you have a really good picture, you  
12 can even see them on the top. They're labeled on  
13 the roof, aren't they?

14 A. Do you want me to mark out S?

15 Q. Sure. S would be right there.

16 A. Right here.

17 Q. So if you're standing in this recreation  
18 yard, recreation yard 1, do you mind marking that  
19 for me?

20 A. (Witness complies.)

21 Q. The only vantage point outside of S is in  
22 the opposite direction -- not the opposite  
23 direction, but perpendicular. You would not be able  
24 to look out a window in the S pod and look into the  
25 first recreation yard cage, would you?

1 A. No.

2 Q. So if somebody testified to a conversation  
3 between the first rec cage and an individual who  
4 happened to be housed in S unit, that would be  
5 impossible?

6 A. If the individual is in the pod, yes.

7 Q. Can you clear that? Great, thank you.

8 Now, is this document something that's  
9 filled out on a daily basis by supervisors?

10 A. Can we go to the bottom real quick? I  
11 believe this one is filled out by the staff that's  
12 assigned to the post.

13 Q. So this would be something that, if things  
14 were done by the book, would be monitored on a daily  
15 basis?

16 A. Yes, sir.

17 Q. And if correction officers were doing  
18 their duty as they should, everybody would be  
19 searched, and you really wouldn't have these items  
20 you were talking about, the iPods, the cups of  
21 coffee, and the paper out on the yard.

22 A. Yes, sir.

23 Q. So that would be, you know, not living up  
24 to snuff, if you will, if you were a correctional  
25 officer, to let that kind of thing out in the yard?

1 A. Yes.

2 Q. It would be out of the ordinary for a  
3 correctional officer to let somebody walk out of  
4 their cell with a rolled-up piece of paper like this  
5 and walk out to the yard?

6 A. Correct.

7 Q. And it would be really against policy for  
8 somebody to hand that to somebody else on the yard?

9 A. Yes, sir.

10 Q. And that's something a document like this  
11 is aimed to manage, to keep that from happening;  
12 correct?

13 A. Yes, sir. Essentially, yes.

14 Q. And in keeping with that, I mean, if  
15 somebody -- if you're in the guard shack here, and  
16 the guard shack is -- can you pull up the --

17 A. Do you want me to point it out?

18 Q. Well, the guard shack is right here;  
19 correct? I can blow this up. But if you're in the  
20 guard shack, it would be the guard's duty to  
21 eliminate or at least stop the communication between  
22 inmates in the rec yard and inmates in the Q pod?

23 A. They should. It doesn't happen, probably.  
24 As a lieutenant, I would try and quell it.

25 Q. I mean, they could get written up for

1 that?

2 A. Yes, sir.

3 Q. The inmates could?

4 A. Yes.

5 Q. And your testimony is: You really don't  
6 recall when the guard shack was built?

7 A. Correct.

8 Q. Is it fair to say that the guard shack was  
9 put in by Manuel Pacheco when he became acting  
10 warden on Level 6?

11 A. I don't recall.

12 Q. You don't recall?

13 A. I don't recall if it was already there  
14 when I was a lieutenant or it wasn't; it wasn't  
15 being utilized. All I can recall is that the  
16 officers did sit in the dog run and hand out keys  
17 and fill out the logs and stuff like that.

18 Q. And they hand out keys basically to keep  
19 inmate violence down so people can't leave one cell  
20 and grab the key and unlock the other cells and let  
21 everybody out and have a riot; correct?

22 A. Yes, sir.

23 Q. So it's a security mechanism to have  
24 somebody posted there?

25 A. Yes, sir.



1 Q. So somebody is posted there throughout the  
2 entire recreation; correct?

3 A. Yes, sir.

4 Q. And they monitor the rec yard to make sure  
5 everything is running smoothly?

6 A. Yes, sir.

7 Q. I want to come back -- and I apologize for  
8 this. I want to come back to the Urquizo -- if you  
9 look at this, Mr. Urquizo says he spent some time on  
10 N3BW pod. And if you read that line -- let me move  
11 this over here -- you would agree with me that  
12 between September 12, 2011, and September 12, 2011,  
13 Mr. Urquizo was only housed at W-105 for just a tad  
14 over three hours; correct?

15 A. I'm sorry, the top of the form, is that  
16 for --

17 Q. For Lupe?

18 A. I can't see the top.

19 Q. Sure. I'll move it down.

20 A. Okay. Yes, sir.

21 Q. And in fairness, you mentioned that you  
22 see the inmate DOC number here; correct?

23 A. Yes, sir.

24 Q. And that would be the same DOC number that  
25 you would see on the rec yard sheet under this

1 column when somebody comes out. That's the number  
2 the staff uses to track an individual inmate;  
3 correct?

4 A. Correct. That's their assigned  
5 Corrections Department number.

6 Q. And using that number, you can essentially  
7 track somebody's movement throughout the entire  
8 facility throughout their whole tenure there;  
9 correct?

10 A. Yes, sir.

11 Q. I mean, from minute to minute from day to  
12 day?

13 A. Yes, sir.

14 Q. Just like we see here that Lupe Urquizo,  
15 when he was on the W-105 cell, he was there from  
16 10:14 on September 12, 2011, to 1:34 p.m. on  
17 September 12, 2011.

18 A. I'm still looking at the top half of that  
19 form.

20 Q. Sure. I'll zoom it out for you.

21 A. Okay.

22 Q. Correct?

23 A. Yes, sir.

24 Q. So Ms. Armijo asked you about Mr. Baca  
25 living on the X pod from May 12, 2011, to September

1 27, 2012, on the X pod. That means Mr. Urquizo  
2 would have only had three hours, approximately, to  
3 communicate with Mr. Baca at all.

4 A. In that instance, yes.

5 Q. Now, hypothetically, if Mr. Urquizo said  
6 the first time he ever spoke with Mr. Baca was in  
7 2012, and Mr. Baca -- well, and Mr. Urquizo was only  
8 in the X pod in 2011, that particular housing  
9 configuration wouldn't be conducive to them having a  
10 conversation, would it?

11 A. Depending on when they go to recreation,  
12 where they're housed, stuff like that, yes.

13 Q. Right. What's the likelihood somebody is  
14 going to go to rec if they're only in a living cell  
15 for three hours?

16 A. It depends on when they go to rec.

17 Q. And you would need to see the recreation  
18 yard records like we have here to make that  
19 determination?

20 A. Yes, sir.

21 MR. LOWRY: May I have a moment, Your  
22 Honor?

23 THE COURT: You may.

24 BY MR. LOWRY:

25 Q. Mr. Sapien, you're familiar, I take it,

1 with the ACA standards in your position as a  
2 lieutenant in the facility, or even STIU.

3 A. Yes, sir. It's been a while.

4 Q. But earlier, you were talking about there  
5 was a problem with the covering on the windows when  
6 you had them flat; right?

7 A. Yes, sir.

8 Q. Because under the ACA standards, it didn't  
9 let in enough sunlight.

10 A. I believe so, yes, sir.

11 Q. So I guess I assume there was either an  
12 inspection or somebody complained and they had to  
13 reconfigure --

14 A. I believe it was the Deputy Warden at the  
15 time that made that.

16 Q. Made that adjustment, if you will?

17 A. Yes.

18 Q. Do you recall who that was?

19 A. I believe it was Lawrence Jaramillo.

20 Q. Okay. Lawrence Jaramillo?

21 A. Yes, sir.

22 Q. Okay. So Lawrence Jaramillo made those  
23 adjustments?

24 A. It could have been Lawrence Jaramillo or  
25 Jerry Roark at the time. It's been a while, like I

1 said. I apologize.

2 Q. Okay. And do you recall who made those  
3 adjustments out on the yard, when they were made?

4 A. The ones that actually put them up?

5 Q. Yeah, who --

6 A. Maintenance, facility maintenance.

7 Q. Okay. Do you recall if any of the folks  
8 there that worked at Level 6 helped Maintenance put  
9 them up?

10 A. I don't.

11 MR. LOWRY: One second, Your Honor.

12 THE COURT: Certainly.

13 MR. LOWRY: I have no further questions,  
14 Your Honor.

15 THE COURT: Thank you, Mr. Lowry.

16 Any other defendant have cross-examination  
17 of Mr. Sapien?

18 All right, Ms. Armijo, if you have  
19 redirect of Mr. Sapien, you may conduct that at this  
20 time.

21 MS. ARMIJO: Thank you, Your Honor.

22 THE COURT: Ms. Armijo.

23 REDIRECT EXAMINATION

24 BY MS. ARMIJO:

25 Q. Mr. Lowry was asking you about whether or

1 not there could have been communications when -- I'm  
2 showing you Exhibit Number 8 -- when Mr. Baca was in  
3 S pod; and if they were in the same -- if they were  
4 all in the same building but in different pods,  
5 could they have still gone to recreation at the same  
6 time?

7 A. Yes, ma'am.

8 Q. And people in recreation, do they have an  
9 opportunity to talk, even though they're in  
10 different cages?

11 A. Yes.

12 Q. You were also asked questions about  
13 whether or not Mr. Lowry even demonstrated, by  
14 rolling up a piece of paper, taking something out to  
15 the recreation yard, given what the policy is. Do  
16 you ever find correctional officers with contraband?

17 A. Yes, ma'am.

18 Q. Are correctional officers sometimes having  
19 an inappropriate relationship with inmates?

20 A. Yes, ma'am.

21 Q. Do correctional officers sometimes let  
22 small violations go by?

23 A. Yes, ma'am.

24 Q. And why is it that they would sometimes do  
25 that?

1           A.     Get lazy, lax, tired of the same  
2 repetitive behavior day after day after day. In  
3 reference to the searches going out to the yard, the  
4 same officers in the same posts for six months,  
5 they're seeing the same individuals going out to the  
6 yard, and just get lax in their duties and diligence  
7 and exactly how they're supposed to do their job,  
8 so...

9           Q.     In addition to being a little bit relaxed  
10 in their job, do sometimes they just are purposely  
11 doing favors for certain inmates?

12          A.     That could happen.

13                MS. ARMIJO: Thank you. I have no further  
14 questions.

15                THE COURT: Thank you, Ms. Armijo.

16                All right, Mr. Sapien. You may step down.

17                Is there any reason that Mr. Sapien cannot  
18 be excused from the proceedings?

19                MS. ARMIJO: No, Your Honor.

20                THE COURT: How about you, Mr. Lowry?

21                MR. LOWRY: No, Your Honor.

22                THE COURT: Any other defendant object?

23                All right. Not seeing or hearing any  
24 objection, you're excused from the proceedings.  
25 Thank you for your testimony.

1 THE WITNESS: Thank you.

2 THE COURT: Ms. Armijo, does the  
3 Government have further witnesses or evidence it  
4 wishes to present on Mr. Baca's motion for a new  
5 trial?

6 MS. ARMIJO: Your Honor, I do not have any  
7 more evidence, other than I did want to put in -- I  
8 guess it would be -- am I up to Exhibit 9? 9.  
9 Tomorrow I will bring the full copy of Mr. Urquizo's  
10 trial transcript.

11 THE COURT: All right. And we agreed that  
12 that would come in; correct? As Exhibit 9.

13 MR. LOWRY: Yes, Your Honor. I thought  
14 our agreement was any trial transcript or any  
15 exhibit used at trial is fair game to use in this  
16 motion. So yeah, I don't have any problem with that  
17 at all.

18 THE COURT: All right. So you can either  
19 bring it or just tell me what to look at, either  
20 one.

21 MS. ARMIJO: I'll bring it so it's easier  
22 for purposes if I have to refer to it.

23 THE COURT: And did I admit 9, Ms. Bevel?  
24 Have I admitted Exhibit 9?

25 THE CLERK: Yes, Your Honor. Exhibit 9 is



1 the location history for Mr. Baca.

2 THE COURT: So this will be 10.

3 THE CLERK: 11.

4 THE COURT: So any other objection or  
5 comment on Exhibit 10?

6 THE CLERK: It needs to be Exhibit 11,  
7 because the 10 is the location history to Lupe  
8 Urquizo.

9 THE COURT: All right. So not hearing or  
10 seeing any objection, Government's Exhibit 11 will  
11 be admitted into evidence.

12 (Government Exhibit 11 admitted.)

13 MS. ARMIJO: Thank you. With that, I  
14 don't believe there is anything else, Your Honor.

15 THE COURT: Mr. Lowry, do you have any  
16 further witnesses or evidence you want to present?

17 MR. LOWRY: Your Honor, the hour is late.  
18 I have one rebuttal witness potentially, Your Honor,  
19 if I could call him in the morning, if necessary,  
20 I'd ask the Court for leave to do that. I'm not  
21 quite sure I'm there, and I might pass on it.

22 But if I could, Your Honor, I did brief  
23 this, and I want to do that, but one other  
24 housekeeping matter I have with Ms. Armijo with  
25 regard to this motion is: I think we had an

1 agreement that Mr. Acee's interview with Joe  
2 Martinez post trial -- there was an April 4  
3 interview that was disclosed on June 25, 2018 --  
4 that we could use that in this motion and I can walk  
5 the Court through why I think it's relevant to this  
6 motion. Ms. Bhalla had mentioned this a few times.  
7 I don't want to get into an argument.

8 THE COURT: Do you have any objection to  
9 it, Ms. Armijo?

10 MS. ARMIJO: I don't, as long as we can  
11 also -- I'm not sure what the relevance is yet, so I  
12 don't -- as long as I can also put in Mr. Martinez'  
13 location history as Exhibit 12.

14 THE COURT: Do you have any objection to  
15 that?

16 MR. LOWRY: No, Your Honor, not at all.

17 THE COURT: Anybody have an objection to  
18 these two exhibits coming in?

19 Not seeing or hearing any objection, your  
20 exhibit, Mr. Lowry, is letter what? Is it FF?

21 THE CLERK: That would be the next one.

22 THE COURT: So Mr. Baca's Exhibit FF will  
23 be admitted into evidence.

24 (Defendant Baca Exhibit FF admitted.)

25 MR. LOWRY: Thank you, Your Honor.

1 THE COURT: And Ms. Armijo, it looks like  
2 yours is going to be number 15.

3 THE CLERK: 12, Your Honor.

4 THE COURT: Isn't that the one I gave to  
5 the transcript that's coming in tomorrow morning?

6 THE CLERK: That was 11.

7 THE COURT: Okay. So Government's Exhibit  
8 12 to Mr. Baca's new trial motion will be admitted  
9 into evidence, as well.

10 (Government Exhibit 12 admitted.)

11 MR. LOWRY: And Your Honor, I don't want  
12 to belabor the point, but Ms. Armijo wanted me to  
13 make the relevance, and it ties into the same issue  
14 Ms. Bhalla had. And if I could walk through that  
15 quickly, why I think it's relevant in the context of  
16 this post trial interview, I'm happy to do that.

17 THE COURT: Before I forget, I think there  
18 is a motion -- Government's motion for extension of  
19 time that was filed related to Mr. Sanchez' 2408.  
20 Any objection to me granting that motion for  
21 extension of time, Ms. Jacks?

22 MS. JACKS: 2408, I'm not sure what -- no,  
23 I don't have a problem.

24 THE COURT: Anybody else on the defense  
25 side have a problem?

1 All right. So Government's Document  
2 Number 2442, which is a motion for extension of  
3 time, will be granted.

4 And I should do the same as to Document  
5 2441 related to Mr. Herrera's motion for new trial.  
6 Any objection to that, Ms. Bhalla?

7 MS. BHALLA: No, Your Honor.

8 THE COURT: All right. Any other  
9 defendant have any objection to that?

10 Not seeing or hearing any, Government's  
11 Document 2441, which is a motion for extension of  
12 time, will be granted as to Mr. Herrera's motion for  
13 a new trial.

14 All right. Mr. Lowry, if you wish to  
15 speak on the relevancy of document FF, you may do so  
16 at this time.

17 MR. LOWRY: Thank you, Your Honor. One  
18 day I'll learn how to manage paper.

19 THE COURT: You need a good paralegal.

20 MR. LOWRY: If we'd only get that CJA  
21 budget to cover that.

22 Your Honor, here is where I just really  
23 drill down on this quickly for the Court. When Mr.  
24 Calbert testified about this infamous exchange of  
25 paperwork on Level 6, Ms. Duncan asked him, because

1 it wasn't clear in any of the 302s or pretrial  
2 interviews. So when we got to trial, Ms. Duncan  
3 asked him when this happened. And David Calbert  
4 said at line 12 on page 46 of his transcript or  
5 partial transcript, he said, "I would say maybe  
6 within four to five months" before he was  
7 transferred from Level 6 to Level 5.

8 Do we have his location history, Calbert?  
9 I thought I had it.

10 But Calbert was transferred. So if you  
11 take David Calbert that he's transferred, and let's  
12 give him the benefit of the doubt, this paperwork  
13 transfer happened five months before he moved from  
14 Level 6 to Level 5, and Mr. Calbert was transferred  
15 on February 13, 2014. That would take him somewhere  
16 approximately September or August of 2013 when he  
17 purportedly met Joe Martinez out on the rec yard and  
18 transferred this paper.

19 And the reason everybody is having a  
20 problem with this at this juncture is because what  
21 Ms. Bhalla said, if you look at Mr. Martinez'  
22 physical location history, he's actually discharged  
23 from the facility, from Level 6, on April 11 of  
24 2013. This is a weird physical location history  
25 because it doesn't really show that he's discharged,

1 but the next line up, you can see that he's at  
2 intake three years later.

3 So Joe Martinez wasn't even in Level 6  
4 when David Calbert says that this transfer of the  
5 paperwork happened. And even if you were very  
6 gratuitous and say, okay, it wasn't five months but  
7 it was 10 months, it still doesn't line up when Mr.  
8 Martinez was there. So that's a problem.

9 Now, the Government has claimed -- and I  
10 can understand why -- they said, well, look, Mr.  
11 Martinez is never going to testify, and he testified  
12 that this transfer of the paperwork never happened  
13 when Mr. Acee spoke with him in April of this year.

14 But I take a different view of that  
15 altogether. I mean, not only was Mr. Martinez  
16 verifying what you can see in the housing records,  
17 but if he was to go in and lie to Mr. Acee -- I  
18 mean, he knows he's committing a 1001 violence and  
19 putting himself at further risk of prosecution.

20 So rather than the Government's  
21 perspective, which is, of course, he's going to deny  
22 it, because he didn't want to admit involvement in  
23 this Molina homicide and earn his own VICAR  
24 prosecution, I take a different view of that  
25 altogether, which is that he's saying what we see in

1 the physical location history, that this transfer of  
2 paperwork was frankly impossible, and he's being  
3 honest with Mr. Acee when they have this  
4 conversation, that it's not a subterfuge where he's  
5 trying to dodge a prosecution.

6 And that's why this becomes -- that's why  
7 the Joe Martinez interview with Mr. Acee becomes  
8 relevant for my motion, because it's the first time  
9 we're able to really get him on the record, so to  
10 speak. I mean, unfortunately, as a defense attorney  
11 in this case, we're really -- anytime we would call  
12 most people -- and by most, I mean 99 percent,  
13 they're going to take the Fifth on the stand here,  
14 and I think that was the first opportunity we had to  
15 get to Mr. Martinez and get his actual honest  
16 perspective on what happened.

17 The reason I think it's an honest  
18 perspective is because he's not being prosecuted for  
19 lying to Mr. Acee. So I really think that goes to  
20 the heart of why I think this Joe Martinez interview  
21 post trial is relevant and it spirals back, and I'll  
22 save this for my pleadings of why these recreation  
23 yard records are exculpatory. But I'll get into  
24 that in my own briefing, Your Honor.

25 But when I spoke to Ms. Bhalla this

1 morning and said I would wrap this up, Your Honor, I  
2 thought that I'd make my argument on my feet, but I  
3 haven't been feeling well, so I'm going to reserve  
4 it for paper.

5 THE COURT: All right. Everybody ready to  
6 shut her down for the day?

7 MS. ARMIJO: Yes, Your Honor. And I would  
8 just like to briefly respond tomorrow morning to the  
9 issue that he brought up.

10 THE COURT: All right. I'll let you.  
11 It's in, so you might work it into your arguments.  
12 So whatever, I'll let you argue, if you want to  
13 respond separately.

14 All right, I appreciate everybody's hard  
15 work. We'll see you at 8:30 in the morning. Have a  
16 good evening.

17 (The Court stood in recess.)  
18  
19  
20  
21  
22  
23  
24  
25




1 UNITED STATES OF AMERICA

2 STATE OF NEW MEXICO

3  
4 C-E-R-T-I-F-I-C-A-T-E

5 I, Jennifer Bean, FAPR, RDR, CRR, RMR, CCR,  
6 Official Court Reporter for the State of New Mexico,  
7 do hereby certify that the foregoing pages  
8 constitute a true transcript of proceedings had  
9 before the said Court, held in the District of New  
10 Mexico, in the matter therein stated.

11 In testimony whereof, I have hereunto set my  
12 hand on this 23rd day of December, 2018.

13  
14   
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